Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 92–55)

SUSPENSION OF INDIVIDUAL CUSTOMS BROKER LICENSE NO. 4333 ISSUED TO MILTON WEINBERG

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Commissioner of Customs pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Parts 111.52 and 111.74 of the Customs Regulations, as amended (CFR 111.52, 111.74), suspended the individual broker license (no. 4333) issued to Mr. Milton Weinberg, effective June 5, 1992. This suspension will last for a period of 270 days.

Dated: June 4, 1992.

C.L. BRAINARD,
Director,
Office of Trade Operations.

[Published in the Federal Register, June 12, 1992 (57 FR 25105)]

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19 CFR Parts 4, 19, 123, 141, 143, 145 and 148

(T.D. 92–56)

CUSTOMS FORM FOR COLLECTION RECEIPT OR INFORMAL ENTRY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document sets forth amendments to the Customs Regulations to reflect adoption of Customs Forms 368 and 368A, Collec-

tion Receipt or Informal Entry. Customs Forms 368 and 368A are identical forms which combine and replace Customs Form 5104 (Cash Receipt) and Customs Form 5119–A (Informal Entry). The amendments involve substituting references to the new forms wherever references to the superseded forms appear in the regulations. In addition, one of the affected regulatory provisions is further amended by correcting an out-of-date reference to the informal entry value limit.

EFFECTIVE DATE: June 12, 1992.

FOR FURTHER INFORMATION CONTACT: John Accetturo, Acting Chief, Revenue Branch, National Finance Center (317–298–1308).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Until recently, Customs administered separate forms for purposes of issuing a receipt for funds paid to Customs (Customs Form 5104, Cash Receipt) and for purposes of informal entries (Customs Form 5119–A, Informal Entry). Customs Form 5104 consisted of a serially numbered, triplicate form and was used principally as a cash receipt and as a receipt for other payments made to Customs not involving payment of duties in connection with the filing of a formal entry/entry summary on Customs Form 7501 (for example, payment of vessel tonnage tax and light money and payment of processing fees for services provided by Customs to arriving vessels, commercial trucks and other conveyances). Customs Form 5119–A was a serially numbered form used in those cases in which merchandise is allowed to be entered under informal entry procedures (for example, most merchandise not exceeding $1,250 in value and certain classes of merchandise entitled to free entry).

In July 1991 Customs instituted use of Customs Forms 368 and 368A, Collection Receipt or Informal Entry. These new forms are identical, serially numbered, triplicate forms which combine the essential elements of, and thus are intended to replace, Customs Forms 5104 and 5119–A. The new forms provide for insertion of information at the top to identify the payer/importer and the remainder of each form is principally divided into two separate parts identified as "Receipt" and "Informal Entry"; each form can be used either as a receipt document or as an informal entry document but an individual form cannot be used for both purposes. The new forms differ from each other only in regard to the manner in which they are distributed and controlled by Customs: Customs Form 368 is distributed as a pad containing 50 triplicate forms attached thereto for use at busier Customs field locations, Customs Form 368A is distributed as a package containing 50 loose triplicate forms to be issued out singly at lower volume Customs field locations, and the recordkeeping procedures to be followed by Customs officers vary somewhat depending on the version being used.

Certain sections within Parts 4, 19, 123, 141, 143, 145 and 148 of the Customs Regulations (19 CFR Parts 4, 19, 123, 141, 143, 145 and 148)

refer to superseded Customs Form 5104 or 5119–A. In order to reflect the adoption of Customs Forms 368 and 368A, this document replaces each such outdated reference with a reference to the new forms. (It should be noted that the amendments to sections 141.68(f) and 145.4(c), as set forth in this document, reflect earlier amendments to those sections effected by T.D. 91–73 which was published in the Federal Register on August 28, 1991 (56 F.R. 42526)). In addition, one of the affected provisions, section 123.4(b), is being further amended by replacing the reference to "$250" with a reference to "$1,250" in order to reflect the current limit for informal entries as provided in 19 U.S.C. 1498(a)(1); this provision was inadvertently omitted when the Customs Regulations were amended to reflect the statutory limit by T.D. 89–82 which was published in the Federal Register on August 31, 1989 (54 F.R. 36025).

Inapplicability of Notice and Delayed Effective Date Requirements

Inasmuch as these amendments constitute a rule of agency management and merely conform the Customs Regulations to, and thus clarify, existing administrative procedures and do not impose any additional substantive requirements on the general public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedures are unnecessary and contrary to the public interest and, for the same reasons pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Executive Order 12291

Because these amendments constitute a rule of agency management, this rule is not subject to E.O. 12291 and, accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

Drafting Information

The principal author of this document was Francis W. Foote, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 4

Customs duties and inspection, Imports, Maritime carriers, Vessels.

19 CFR Part 19

Customs duties and inspection, Imports, Bonded warehouses.

19 CFR Part 123

Customs duties and inspection, Imports, Canada, Mexico.

19 CFR Part 141

Customs duties and inspection, Imports, Entry procedures.

19 CFR Part 143

Customs duties and inspection, Imports, Entry procedures.

19 CFR Part 145

Customs duties and inspection, Imports, Postal service.

19 CFR Part 148

Customs duties and inspection, Imports.

AMENDMENTS TO THE REGULATIONS

Accordingly, for the reasons stated above, Parts 4, 19, 123, 141, 143, 145 and 148, Customs Regulations (19 CFR Parts 4, 19, 123, 141, 143, 145 and 148), are amended as set forth below.

PART 4 – VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3;

2. Section 4.23, first sentence, is amended by removing the words "(Customs Form 5104)" and adding, in their place, the words "(Customs Form 368 or 368A)".

PART 19 – CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for Part 19 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624.

2. Section 19.9(c), second sentence, is amended by removing the words "Customs Form 3461, 7501, 5119–A," and adding, in their place, the words "Customs Form 3461, 7501, 368 or 368A,".

PART 123 – CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The authority citation for Part 123 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624.

* * * * * * *

Section 123.4 also issued under 19 U.S.C. 1484, 1498;

* * * * * * *

2. Section 123.4(b), first sentence, is amended by removing the words "$250 in value entered on Customs Form 5119–A," and adding, in their place, the words "$1,250 in value entered on Customs Form 368 or 368A".

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

Section 141.68 also issued under 19 U.S.C. 1315;

* * * * * * *

2. Section 141.68 is amended as follows:

(a) Paragraph (f) is amended by removing the words "Customs Form 3419, 3419A or 5119–A" and adding, in their place, the words "Customs Form 3419 or 3419A or Customs Form 368 or 368A".

(b) Paragraph (h) is amended by removing the words "Customs Form 5119–A" wherever they appear and adding, in their place, the words "Customs Form 368 or 368A".

PART 143—SPECIAL ENTRY PROCEDURES

1. The authority citation for Part 143 continues to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

2. Section 143.23, introductory text, is amended by removing the words "Customs Form 5119–A," and adding, in their place, the words "Customs Form 368 or 368A".

3. The section heading to § 143.24 is revised to read "Preparation of Customs Form 7501 and Customs Form 368 or 368A (serially numbered)."

4. Section 143.24, second sentence, is amended by removing the words "Customs Form 5119–A" and adding, in their place, the words "Customs Form 368 or 368A".

5. Section 143.25 is amended by removing the words "Customs Form 5119–A" and adding, in their place, the words "Customs Form 368 or 368A".

PART 145—MAIL IMPORTATIONS

1. The authority citation for Part 145 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624.

Section 145.4 also issued under 18 U.S.C. 545, 19 U.S.C. 1618;

* * * * * * *

Section 145.12 also issued under 19 U.S.C. 1315, 1484, 1498;

* * * * * * *

2. Section 145.4(c), first sentence, is amended by removing the words "Customs Form 3419, 3419A or 5119–A (serially numbered) or 7501" and adding, in their place, the words "Customs Form 3419 or 3419A or Customs Form 368 or 368A (serially numbered) or Customs Form 7501".

3. Section 145.12 is amended as follows:

(a) Paragraph (b)(1), second sentence, is amended by removing the words "(Customs Form 5119–A), (serially numbered)" and adding, in their place, the words ", Customs Form 368 or 368A (serially numbered),".

(b) Paragraph (c), first sentence, is amended by removing the words "Customs Form 5119–A, (serially numbered)" and adding, in their place, the words "Customs Form 368 or 368A (serially numbered)".

(c) Paragraph (e)(1), second sentence, is amended by removing the words "Customs Form 5119–A, (serially numbered)" and adding, in their place, the words "Customs Form 368 or 368A (serially numbered),".

PART 148 – PERSONAL DECLARATIONS AND EXEMPTIONS

1. The general authority citation for Part 148 continues to read as follows:

Authority: 19 U.S.C. 66, 1496, 1624. The provisions of this part, except for subpart C, are also issued under General Note 8, Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202;

2. Section 148.12(c) is amended by removing the words "Customs Form 5104" and adding, in their place, the words "Customs Form 368 or 368A".

3. Section 148.27 is amended by removing the words "Customs Form 5104" and adding, in their place, the words "Customs Form 368 or 368A".

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: May 26, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury (Enforcement).

[Published in the Federal Register, June 12, 1992 (57 FR 24942)]

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19 CFR Part 24

(T.D. 92–57)

PERSONAL INFORMATION ON CHECKS SUBMITTED TO CUSTOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide that certain identifying information must be recorded on personal checks over $25 presented to Customs in payment of duties, taxes, and other charges due on noncommercial importations. The identifying information consists of the payor's name, home and business telephone number with area code, and date of birth, as well as one of the following: The payor's social security number, current passport number, or current driver's license number and issuing state. The amendment enhances the ability of Customs to pursue collection efforts on debts arising from dishonored personal checks.

EFFECTIVE DATE: July 16, 1992.

FOR FURTHER INFORMATION CONTACT: Robert Hamilton, Revenue Branch, National Finance Center (317–298–1308).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In an effort to facilitate collection on debts arising from dishonored personal checks presented to Customs in payment of duties, taxes, and other charges on noncommercial importations at piers, terminals, bridges, airports and other similar places, on July 11, 1991, Customs published a notice in the Federal Register (56 F.R. 31576) proposing to amend the Customs Regulations to set forth specific identifying information regarding the payor that must be recorded on personal checks over $25 in amount submitted to Customs to cover such payments. Specifically, the notice proposed an amendment to § 24.1(b) of the Customs Regulations (19 CFR 24.1(b)) to require that the following be recorded on such checks: (1) the payor's name, home and business telephone number including area code, and date of birth, and (2) the payor's social security number or current passport number or current driver's license number including issuing state.

The notice solicited comments from the public regarding the proposal, and the public comment period closed on September 9, 1991. No comments were submitted in response to the notice. In addition, the notice stated that, in accordance with the requirements of § 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a Note) regarding any request for disclosure of a social security number by an individual, Customs would have in place a procedure to inform each payor that the disclosure is voluntary, by what statutory or other authority the number is solicited, and what uses will be made of it.

Based on the above, Customs has determined that the proposed regulatory amendment should be adopted as a final rule. The regulatory text, as set forth below, is identical to the proposed text except for certain non-substantive changes of a purely editorial nature intended primarily to improve the clarity of the text.

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because this matter relates to agency organization and management, it is not subject to either Executive Order 12291 or the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 24

Customs duties and inspection, Imports, Accounting, Claims, Taxes.

AMENDMENT TO THE REGULATIONS

Based on the above, Part 24, Customs Regulations (19 CFR Part 24), is amended as set forth below:

PART 24 – CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58a–58c, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624, 31 U.S.C. 9701, unless otherwise noted.

Section 24.1 also issued under 19 U.S.C. 197, 198, 1648;

* * * * * * *

2. The introductory text of § 24.1(b) is revised to read as follows:

§ 24.1 Collection of Customs duties, taxes, and other charges.

* * * * * * *

(b) At piers, terminals, bridges, airports and other similar places, in addition to the methods of payment prescribed in paragraph (a) of this section, a personal check drawn on a national or state bank or trust company of the United States shall be accepted by Customs inspectors and other Customs employees authorized to receive Customs collections in payment of duties, taxes, and other charges on noncommercial importations, subject to the identification requirements of paragraph (a)(4) of this section and this paragraph. Where the amount of the check is over $25, the Customs cashier or other employee authorized to receive Customs collections shall ensure that the payor's name, home and business telephone number including area code, and date of birth are recorded on the instrument. In addition, one of the following shall be recorded on the instrument: The payor's social security number, current passport number, or current driver's license number including issuing state. A personal check received under this paragraph and a United States Government check, traveler's check, or money order received under

paragraph (a) of this section by such Customs inspectors and other Customs employees shall also be subject to the following conditions:

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: June 2, 1992.
DENNIS M. O'CONNELL,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, June 16, 1992 (57 FR 26775)]

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 101

EXTENSION OF PORT LIMITS OF MORGAN CITY, LOUISIANA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations pertaining to the field organization of Customs by extending the geographical limits of the port of entry of Morgan City, Louisiana. The proposed change is being made as part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources and to provide better service to carriers, importers, and the general public.

DATES: Comments must be received on or before August 17, 1992.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Peg Reyen, Office of Inspection and Control (202–566–8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public, Customs is proposing to amend §§ 101.3 and 101.4, Customs Regulations (19 CFR 101.3 and 101.4), by extending the geographical limits of the port of entry of Morgan City, Louisiana.

In the list of Customs regions, districts, and ports of entry set forth in § 101.3(b), Morgan City is listed as a port of entry in the New Orleans, Louisiana, Customs District within the South Central Region. The Morgan City port of entry was originally established by T.D. 54682 (published in the Federal Register on September 16, 1958, 23 F.R. 7131) with specific geographical limits which may be described generally as encompassing the southeastern one-third of St. Mary Parish and including the town of Morgan City where the office of the Customs Port Director is currently located. The geographical limits of the Morgan City port of en-

try were republished without change in connection with a restatement of all New Orleans Customs District port boundaries in T.D. 84–126 (published in the Federal Register on May 31, 1984, 49 F.R. 22629).

In addition, in § 101.4(c), Houma, Louisiana (located within Terrebonne Parish), and Galliano, Louisiana (located within Lafourche Parish), are listed as Customs stations within the New Orleans Customs District and under the supervision of the Morgan City port of entry. Customs stations are defined in § 101.1(d), Customs Regulations, as "any place, other than a port of entry, at which Customs officers or employees are stationed * * *" for purposes of entering and clearing vessels, accepting entries of merchandise, collecting duties, and enforcing the various provisions of the Customs and navigation laws of the United States. Thus, Customs stations are by definition located outside the limits of a port of entry, and Customs services are normally provided to the public at Customs stations on a reimbursable basis.

The Morgan City port of entry was established primarily to provide vessel documentation (now the function of the U.S. Coast Guard) in southwest Louisiana, and for a number of years after creation of the port of entry most Customs functions could be adequately carried out within the port limits as originally established by T.D. 54682. However, in more recent years the Customs workload increased significantly in both volume and geographical scope, with the result that the majority of Customs service provided by the Morgan City port of entry now takes place outside the present port limits, extending to Iberia Parish to the west of St. Mary Parish and, on the east, to the parishes of Terrebonne and Lafourche and the town of Grand Isle in Jefferson Parish.

Iberia Parish regularly receives foreign steel shipments by LASH-type barge and has a livestock export facility at its airport, and international trade activities, including the construction of warehousing and other support facilities, is on the increase in both Iberia Parish and in the western portion of St. Mary Parish. Terrebonne and Lafourche Parishes include four major shipyards where vessel construction and drydock repairs take place and where Customs clearance is required in connection with vessels arriving for repairs, and approximately 20 additional vessel arrivals take place each month at docking facilities along the Intracoastal Waterway within these two parishes. In addition, Port Fourchon, which is located in Lafourche Parish, serves as a hub for helicopter and service launch traffic to lightering vessels and tankers at the Louisiana Offshore Oil Port (LOOP) supertanker unloading terminal, resulting in approximately 100 helicopter and 45 service launch clearances by Customs each month in addition to the Customs services rendered in connection with the approximately 270 tankers arrivals at the LOOP each year. Port Fourchon is also used as a base for foreign-flag research vessels and derrick barges operating in the Gulf of Mexico, and vessels carrying containerized and other cargo from foreign countries arrive at Port Fourchon on a weekly basis. Finally, the town of Grand Isle is the home port for a large number of private seagoing yachts which

are required to report to Customs upon arrival from any foreign port or place. Customs services in connection with all of these activities are provided by personnel assigned to the Morgan City port of entry.

Based on the present Customs workload pattern described above, Customs proposes to extend the present limits of the Morgan City port of entry to include all territory within the parishes of Iberia, St. Mary, Terrebonne, and Lafourche, as well as the incorporated limits of the town of Grand Isle in Jefferson Parish and that portion of the State highway which connects Grand Isle to Lafourche Parish. Customs believes that the proposed extension, if adopted, would provide significant benefits to both Customs and the public. Although the name of the port of entry would remain Morgan City, extension of the port limits would enable Customs to move the office of the Port Director to Galliano in Lafourche Parish, which is more centrally located given present workload conditions. This relocation would increase the efficiency and productivity of the Port Director's office by reducing the time and effort required for travel and transportation of documents between the office and other locations within the extended port of entry, by enabling the Port Director to more effectively administer outside assignments and oversee other port details, and by streamlining Customs duty and other collection procedures. This increase in Customs efficiency and productivity would have corresponding benefits for the public by enabling Customs to be more responsive to the needs of the trade community. In addition, by extending the present port of entry limits to include areas now serviced by Customs on a reimbursable basis, the proposal would reduce the operating costs of private sector recipients of those services and would thereby lead to an improvement in the overall prospects for increased international trade in the area covered by the new port of entry limits.

The proposed extended geographical limits of the Morgan City port of entry are specifically as follows:

> In the State of Louisiana: all of the territory within the Parishes of Iberia, St. Mary, Terrebonne, and Lafourche; that portion of the right-of-way pertaining to State Highway 1 extending in a northeasterly direction from the Lafourche Parish and Jefferson Parish boundary line to the corporate limits of the town of Grand Isle; and the corporate limits of the town of Grand Isle.

If the proposed Morgan City port of entry limits are adopted, the list of Customs regions, districts, and ports of entry in 19 CFR 101.3(b) will be amended accordingly. In addition, the list of Customs stations in 19 CFR 101.4(c) will be amended to remove the references to the Customs stations at Houma and Galliano as these will fall within the new port of entry limits and thus will no longer retain their separate identities as Customs stations.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will

be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C.

AUTHORITY

This change is proposed under the authority of 5 U.S.C. 301 and 19 U.S.C. 2, 66 and 1624.

REGULATORY FLEXIBILITY ACT

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this document is being issued with notice for public comment, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EXECUTIVE ORDER 12291

Because this document relates to agency management and organization, it is not subject to E.O. 12291.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

CAROL HALLETT,
Commissioner of Customs.

Approved: June 2, 1992.
DENNIS M. O'CONNELL,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, June 16, 1992 (57 FR 26806)]

19 CFR Part 101

CUSTOMS SERVICE FIELD ORGANIZATION VICKSBURG, MISSISSIPPI

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule, solicitation of comments.

SUMMARY: This document proposes to amend the Customs Regulations governing the Customs field organization by changing the boundaries of the Port of Vicksburg, Mississippi, which lies within the South Central Region. The current port boundaries would be expanded to encompass the user fee airport at Jackson, Mississippi and the neighboring counties of Hinds, Rankin, and Madison. This change is being made to reflect the changing nature of the international trade in the area from the river to the airport.

DATE: Comments must be received on or before August 17, 1992.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Peg Reyen, Office of Workforce Effectiveness and Development, Office of Inspection and Control, U.S. Customs Service, (202) 566–8157.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of its continuing program to obtain more efficient use of its personnel, facilities and resources, and to provide better service to carriers, importers and the public, Customs proposes to amend § 101.3, Customs Regulations (19 CFR 101.3), by realigning the boundaries of the port of Vicksburg, Mississippi, in the South Central Region. The proposed expansion of the port would add the Mississippi counties of Hinds, Rankin, and Madison to the existing limits which are Warren County in Mississippi and Madison Parish in Louisiana.

The present port of Vicksburg generates little Customs activity. However, the volume of international traffic at the user fee airport at Jackson, Mississippi, which was established in 1989, has become increasingly significant. The activity in the area is not occurring within the present port limits of Vicksburg, but is at the airport and in the neighboring counties which are served by the airport. Accordingly, Customs believes that the port limits should be expanded to include the three neighboring counties and Jackson International Airport.

By including the Jackson International Airport within the limits of the port of entry, Customs will convert the status of the airport from a user fee airport to a landing rights airport. Through this proposed change the public and importers will be better served and Customs personnel and resources will be more efficiently utilized. It is not antici-

pated that this change will have any adverse financial impact on either the agency or the community.

The proposed revised limits of the port of Vicksburg are as follows:

All of the territory within Madison Parish, Louisiana, and Warren, Hinds, Rankin, and Madison counties, Mississippi.

If the proposed extension of the boundaries of the port is adopted, the list of Customs and ports of entry in 19 CFR 101.3(b) will be amended accordingly.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m., at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This change is proposed under the authority of 5 U.S.C. 301 and 19 U.S.C. 2, 66 and 1624.

REGULATORY FLEXIBILITY ACT

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this document is being issued with notice for public comment, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EXECUTIVE ORDER 12291

Because this document relates to agency organization and management, it is not subject to E.O. 12291.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: June 2, 1992.

DENNIS M. O'CONNELL,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, June 16, 1992 (57 FR 26805)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–80)

REGALITI, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–03–00201

[Judgment for defendant.]

(Dated May 21, 1992)

Rode & Qualey (*Patrick D. Gill*) for plaintiff.
Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Pamala G. Larrabee*), United States Department of Justice, Civil Division, for defendant.

OPINION

RESTANI, *Judge:* This case involves the classification for tariff purposes of women's garments, which are currently known in the fashion industry as "leggings." The garments at issue are form-fitting combination leg and lower torso coverings which are of varying lengths, from below the knee to ankle length and which may include stirrups running under the mid-part of the foot. The garments are cut and sewn knitted items of 95% cotton and 5 spandex.[1]

The United States Customs Service, after some debate, classified the garments under item 6104.62.20101 of the Harmonized Code ("HTSUS"). Plaintiff claims classification under HTSUS item 6115.19.00106 or alternatively under a general provision for other knitwear, HTSUS 6114.20.00603. At trial plaintiff also claimed classification under HTSUS item 6406.99.15805, which is under a heading that includes "leggings." But the leggings referred to in that heading are two-piece articles and are not the current fashion item known as "leggings." This use of the word "leggings" was not common at the time of passage of the Harmonized Code. Thus, the relevant tariff classifications are as follows:

[1] This opinion memorializes the bench ruling of May 20, 1992. Plaintiff requested an expedited trial and decision.

HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES ANNOTATED (1992)

6104	Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: * * *	
	Trousers, bib and brace overalls, breeches and shorts: * * *	
6104.62	Of cotton: * * *	
6104.62.20	Other	16.7%
	Trousers and breeches:	
6104.62.20101	Women's	(348)
* * * * * * *		
6114	Other garments, knitted or crocheted: * * *	
6114.20.00	Of cotton	11.5%
	Other: * * *	
6114.20.00603	Women's or girls'	(359)
* * * * * * *		
6115	Panty hose, tights, stockings, socks and other hosiery, including stockings for varicose veins, and footwear without applied soles, knitted or crocheted:	
	Panty hose and tights: * * *	
6115.19.00	Of other textile materials	17%
6115.19.00106	Of cotton	(359)
* * * * * * *		

The parties are in agreement that according to the General Rules of Interpretation ("GRI") of the HTSUS, if two items apply, the higher numbered item will govern. *See* GRI 3. The "other" category is only reached if neither more specific category applies.

Heading 6104 covers numerous items of knitted outer apparel and includes "trousers." Several witnesses testified that the garments at issue do not fit the commonly understood fashion concept of "trousers," although they may fit the more general concept of "pants." The court finds that the word "trousers" as used in heading 6104 is a general term covering any knit streetwear bottom, as 6104 is the general knit apparel provision. There is no other provision for knit "pants" and it is clear that the drafters would not wish to leave the entire general area of knit pants to a basket provision. Therefore, the only sensible way to read the word

"trousers" in 6104 is not as constructed, highly tailored pants, but as general streetwear bottoms.[2] The garments at issue are clearly pants. They are streetwear bottoms. Thus, they fall within item 6104.62.20101.

The more difficult question in this case is whether the articles at issue are tights. If they are, item 6115.19.00106 will control classification. The court has been provided with many definitions of "tights." The garments at issue would appear to fit most of those definitions, but other items which are not commonly known as tights would also fit the definitions. When it comes to defining fashion leg wear, the lexicographic sources are not particularly helpful and, as witnesses indicated, are not often used in the industry. They become dated very quickly.

What all parties would appear to agree constitute women's "tights" are items which resemble panty hose, but which are made of thicker material. They may also lack feet. These items are generally sold in packages in hosiery departments. They are also sold in specialty stores, such as stores specializing in dance and exercise wear.

There was no evidence that the items at issue here are ever sold folded, in packages, or in hosiery departments. The evidence revealed instead that they are displayed on pants hangers with other street wear items. They are of fairly thick, stretchy material and are usually worn with tee shirts, tunics, sweaters, jackets or leotards, covering most of the lower torso. The truly fit or very young may wear them with no covering over the lower torso, for example with short tops known as "crop tops." Evidence revealed that the items are advertised in all of these ways.

Plaintiff's fashion merchandising experts testified that these items were "tights," and plaintiff advertises them as "tights." Defendant's manufacturing and merchandising experts testified they were not "tights," and other advertising would appear not to refer to them as "tights," but as "leggings."

The court is not highly persuaded by plaintiff's invoices or advertising calling the items "tights." To avoid pants quota limitations plaintiff must refer to the items as "tights." The court is more persuaded by the fact that others do not usually call these items tights and plaintiff's customers do not sell them or display them as one would ordinarily display and sell what are commonly considered "tights," that is hosiery-type tights.

Of crucial importance to the court, however, is the wording of the tariff heading at issue, 6115. Except for a reference to a footwear article, a slipper which would appear to be something like a very heavy sock, the heading covers hosiery articles, that is articles commonly thought of as underwear or innerwear, not street clothes. The fact that the articles at issue are used as exercise wear does not make them underwear. Gyms and health clubs have become places to display fashions. While less modesty may be the norm in comparison to street attire, denizens of health

[2] In common American parlance "trousers" is a more old fashioned, perhaps formal, way of saying "pants," which also has the advantage of avoiding any reference to underwear.

clubs likely would not consider themselves to be exercising in underwear.

Defendants have argued that tights are hosiery and currently all hosiery is made on small diameter circular knitting machines.[3] The court does not find it necessary to so restrict the coverage of heading 6115. Whether the definition of hosiery includes this manufacturing limitation or not, heading 6115 does not cover the garments at issue. Garments classified under heading 6115 must be hosiery or very similar to hosiery. That is the thrust of the provision. The explanatory notes to the harmonized code support this view, as they consider panty hose and tights to be very similar, if not identical.

Accordingly, the court concludes that the items at issue are not commonly known as "tights." They are not similar to hosiery. They are not marketed like hosiery. The garments at issue are "pants." They are used for exercise or streetwear and they belong under the general knit apparel heading, 6104.

(Slip Op. 92–81)

UNITED STATES, PLAINTIFF *v.* MENARD, INC., DEFENDANT

Court No. 89–05–00238

MEMORANDUM OPINION AND ORDER

[Defendant's motion for summary judgment is denied; plaintiff's motion for partial summary judgment is granted.]

(Decided May 21, 1992)

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Jane E. Meehan*, Attorney), for plaintiff.
Irving A. Mandel (*Thomas J. Kovarick* of counsel), for defendant Menard, Inc.

WATSON, *Senior Judge:* This is an action in which the government seeks to enforce civil penalties and collect customs duties, pursuant to 19 U.S.C. § 1592 (Tariff Act of 1930, § 592). Jurisdiction is based on 19 U.S.C. § 1582. The matter is currently before the Court pursuant to defendant's motion for summary judgment and plaintiff's cross-motion for partial summary judgment.

Defendant is a closely held corporation with headquarters in Eau Claire, Wisconsin. It operates retail home centers in Wisconsin, Minnesota, Iowa, North Dakota and Illinois, and also builds and sells post frame buildings, and manufacturers building components. In the period from 1983 to 1986, Menard imported hardware and housewares from Taiwan, through several ports of entry.

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[3] This results in no side seams.

On April 29, 1986, the Minneapolis region District Director of Customs was advised by certain customs brokers in Minneapolis that Menard, Inc. had submitted entry documents to Customs which contained undervalued prices on imported merchandise. As a result, Customs investigated the matter, and performed a regulatory audit upon Menard's books and records in Eau Claire for the period of October, 1983 through May, 1986.

Customs auditors reviewed 1,954 entries filed by Menard during that period.

The audit showed that Menard was taking credit for previously imported, allegedly defective merchandise by deducting a determined amount from the amount due on the current purchase orders. The vendor adjusted unit prices for items ordered to give Menard credit on previously imported items which were claimed to be defective.

Customs determined that this practice resulted in loss of revenue of $53,215.30 upon imported merchandise. The loss resulted from undervalued prices of merchandise declared upon one hundred and forty Customs consumption entries. Customs issued a prepenalty notice to Menard on December 5, 1988, stating that it proposed to assess a monetary penalty of more than $200,000 (four times the loss of revenue) for gross negligence pursuant to 19 U.S.C. § 1592. Menard officials attended an oral conference with Customs in Minneapolis, and Menard submitted prepenalty response on December 20, 1988. On January 12, 1989, Customs issued Menard a penalty notice in the amount of $106,209.90 (two times the amount of lost revenue), for *negligent* violation pursuant to 19 U.S.C. § 1592. Correspondence ensued, and the assessed penalty was not paid.

On May 4, 1989, the government instituted this action to collect the lost duties and civil penalty assessed against Menard. Its complaint alleges 1) "[t]he violations of 19 U.S.C. § 1592 * * * were the result of negligence [and] the penalty for negligence is $100,326.62, which amount represents two times the lawful duties of which the United States was deprived," and 2) "[p]ursuant to 19 U.S.C. § 1592(d), defendant is liable for customs duties owed in the amount of $50,163.31 plus interest."

Section 1592 provides for "penalties for fraud, gross negligence, and negligence." It states:

(a) Prohibition.–

> (1) General rule.–Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence–
>
> (A) may enter, introduce, or attempt to enter introduce any merchandise into the commerce of the United States by means of–
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> (i) any document, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. § 1592(a)(1).

The penalty provision of the statute provides:

> (3) Negligence.–A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed–
> (A) the lesser of–
> (i) the domestic value of the merchandise, or
> (ii) two times the lawful duties of which the United States is or may be deprived, * * *

19 U.S.C. § 1592 (c)(3). Under § 1592 (e)(4), "if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence."

Defendant Menard has moved for summary judgment pursuant to Rule 56 of the Rules of the United States Court of International Trade, seeking to dismiss the government's case for three reasons. It claims that 1) evidence of a false statement or document, essential to a § 1592 penalty claim, does not exist; 2) that the statute of limitation for collecting duty on subject entries has expired, and 3) that it does not owe any money to the government, having not only paid the Customs duty owed, but having paid it earlier than the law required, so that "equitable recoupment" bars the government from collecting these duties twice.

Essentially, the parties do not dispute the facts regarding the importation. Both seem to agree that a previous importation of merchandise, on which duties were paid, turned out to be defective. They also agree that there was a later importation of merchandise, which is the subject of this case, and that Menard adjusted the declared value of the later merchandise in order to compensate itself for duties previously paid on merchandise later determined to be defective. What divides the parties is the question of the propriety of the manner in which Menard made those adjustments.

Menard's explanation of its position is relatively straightforward:

> Menard's system of accounting for defective merchandise did not involve filing protests to receive duty refunds on the defective shipments. Instead, it negotiated price credits on later shipments from the same vendor. The auditors verified this practice. * * * The purchase orders for the subject merchandise did not reflect the negotiated credits, and therefore contained price quotations that were higher than the invoice prices. * * * Customs admits that Menard accepted and paid the invoice prices. Thus, the invoice prices, not the purchase orders, reflected the "price paid or payable" for the subject merchandise.

Defendant's Motion for Summary Judgment at 4.

Menard alleges that Customs is attempting to collect duty twice by seeking duty on the merchandise at its price prior to the price reductions negotiated to compensate for the previously imported defective merchandise. It assets that the requirements of § 1592(a)(1)(A)(i) for the

presence of a statement or statements which are "material and false" have not been met because there are no such statements. Menard maintains that the "price actually paid or payable for the merchandise," under § 402 of the Tariff Act of 1930, was the invoice price. Since Menard agreed to and actually did pay duties on those prices, it claims that it declared the correct dutiable values and paid the proper amount to Customs.

Finally, Menard alleges that the Court has upheld a ninety day statute of limitations for actions to collect duties under § 1592 penalty cases which do not involve fraud. Menard interprets the statute as stating that in penalty cases not involving fraud, "[a] protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before – (A) notice of liquidation or reliquidation." 19 U.S.C. § 1514 (c)(2)(A). The subject entries were made between 1984 and 1986, and the action was commenced on or about May 4, 1989. Thus, Menard claims that the government is barred from collecting additional duties on these entries.

Defendant Menard also asserts that under the theory of equitable recoupment, it is entitled to a refund for previous overpayment of duties on defective merchandise, despite the fact that the time to file protests has expired. Under this theory, there is no money owed for the government to collect, that is to say, previous overpayment established a sort of credit from which the government may theoretically deduct any balance it believes it is owed by Menard.

In its cross-motion for partial summary judgment, the government asks the Court to find that defendant-Menard negligently violated 19 U.S.C. § 1592 and enter partial summary judgment in its favor. In the alternative, the government asks the Court to specify those facts that appear without substantial controversy, pursuant to C.I.T. Rule 56(e).

The government alleges that the purchase orders, containing price quotations which did not include the defective merchandise credits, reflect the proper dutiable values. It claims that Menard caused statements to be made which represented the price or value of the entries to be lower than the actual purchase prices. The statements were material, inasmuch as they caused the government to lose customs duties. The government further argues that its claims are not time-barred, since there is no specified period within which the government must institute an action to collect lost duties pursuant to 19 U.S.C. § 1592(d).

In addition, the government asserts that Menard is not entitled to recoupment because 1) it failed to protest previous overpayment in a timely manner, and 2) the overpayment didn't arise from the same transactions or occurrences upon which the complaint is based. The government argues that Menard's conclusory statements are unsupported by affidavits or declarations setting forth specific facts regarding the overpayment of duties upon entries of merchandise which was allegedly defective.

Plaintiff United States has submitted a lengthy statement pursuant to Rule 56(i).[1]

In its 56(i) statement, plaintiff provides what it asserts are pertinent facts regarding the 132 entries in question, as derived from the relevant documents. Each entry is identified along with its invoice value, purchase order number and value, the difference in values and applicable dutiable rates, and the amount of duty the government claims was lost as a result.

Menard failed to controvert plaintiff's 56(i) statement with any specificity, claiming that "it would be unconscionable to require that Menard respond to each of the 3,305 paragraphs of irrelevant and legally conclusory allegations contained in plaintiff's 325 page Rule 56(i) statement."

This Court does not accept defendant's blanket denial as a proper controversion to plaintiff's statement. The Court of Appeals for the Federal Circuit has held:

> Where a movant has supported its motion with affidavits or other evidence which, unopposed, would establish its right to judgment, the non-movant may not rest upon general denials in its pleading or otherwise, but must proffer countering evidence sufficient to create a genuine factual dispute. A dispute is *genuine* only if, on the entirety of the record, a reasonable jury could resolve a factual matter in favor of the non-movant.
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> * * * * * * *
>
> Mere conclusory statements and denials do not take on dignity by placing them in affidavit form.

Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1562–64 (Fed. Cir. 1987). Defendant Menard responded to paragraph 1 through 3,305 of plaintiff's statement with one word: "denies."

Despite its denial, Menard has proffered no "countering evidence sufficient to create a genuine factual dispute." This Court applied the *Sweats Fashions* analysis of the Rule, and on March 2, 1992, granted plaintiff's motion to deem admitted the contents of plaintiff's Rule 56(i) statement. As material facts are no longer in dispute, resolution of this matter rests solely upon application of the relevant law.

Defendant claims that the statute of limitations bars the government from collecting duty on the subject entries. To support its argument, defendant relies upon *United States v. Appendagez, Inc.*, 560 F.Supp. 50 (C.I.T. 1983). The *Appendagez* Court held:

> The applicable statutory provision, 19 U.S.C. § 1521, provides that if the appropriate customs officer finds probable cause to believe

[1] Rule 56i of the United States Court of International Trade Rules states:

> Upon any motion for summary judgment, there shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

> that there is fraud in the case, he may reliquidate an entry within two years after the date of liquidation or last reliquidation. If there is no probable cause to believe that there is fraud in the case, 19 U.S.C. § 1514(c)(2)(A) applies, and the cause of action is time barred if not brought within 90 days after notice of liquidation or reliquidation.

Id. at 55.

The Court "with[held] its decision on whether plaintiff's claim for duties of which it was deprived [was] time barred," because it could not determine "when, if ever, the disputed entries were liquidated or reliquidated, and whether the appropriate customs officer had probable cause to believe there was fraud in the case." *Id.* at 56. It did, however find that "the claims on entries made prior to five years from the commencement of this action are time barred." *Id.*

In this case, the defendant asserts that the action to collect duties is time barred because the government has not alleged fraud. The government claims that the *Appendagez* court erred in stating that 19 U.S.C. §§ 1514 and 1521 operate as a statute of limitations on government actions for collection of duties pursuant to 1592(d). It interprets § 1592(d) as entitling Customs to require that lawful duties which have been deprived should be restored, and claims § 1514 cannot be construed as limiting recovery of duties authorized by § 1592(d).[2]

Recognizing that provisions for liquidation and reliquidation were insufficient to permit the United States to recover revenue lost through

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[2] The pertinent parts of the statute state:

§ 1514. Protest against decision of appropriate customs officer.

(a) Finality of decisions; return of papers.
Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidation), section 1516 of this title (relating to petitions by domestic interested parties), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidation on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title. When a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

* * * * * * *

(c)(2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—
(A) notice of liquidation or reliquidation, or
(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

§ 1521. Reliquidation on account of fraud.

If the appropriate customs officer finds probable cause to believe there is fraud in the case, he may reliquidate an entry within two years (exclusive of the time during which a protest is pending) after the date of liquidation or last reliquidation.

§ 1592. Penalties for fraud, gross negligence, and negligence.

* * * * * * *

(d) Deprivation of lawful duties. -Notwithstanding section 1414 of this title, if the United States has been deprived of lawful duties as a result of a violation of subsection (1) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed.

culpable acts of importers, Congress implemented § 1592(d) to remedy the situation. This Court agrees with the government's interpretation that neither § 1514 or § 1521 can be construed as a statute of limitations for recovery of duties under § 1592, because both sections serve different purposes.

A close reading of 19 U.S.C. § 1621 reveals the flaws in defendant's argument:

> **§ 1621. Limitation of actions.**
>
> No suit or action to recover any pecuniary penalty of forfeiture of property accruing under the customs laws shall be instituted unless such suit of action is commenced within five years after the time when the alleged offense was discovered: *Provided,* That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed: *Provided further,* That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation.

Section 1621 provides that the government must bring suit for penalties under § 1592 within five years from the date of discovery of the violation (in the case of fraud), or five years from the date the violation was committed (in the case of gross negligence or negligence). Defendant's argument that the time limit for recovering penalties is shorter is unreasonable.

This Court agrees with the government's contention that the purpose of § 1592(d) is to make the government whole for revenue lost as a result of submission of false statements to Customs. The government claims that there is no specific limitation on the period during which the government must seek restoration of lost duties resulting from a violation of § 1592, and that there is no general statute of limitations applicable to the entire statute. Defendant's interpretation of the statute is not reasonable, in light of the fact that Customs probably would not be aware of such violations until long after the 90 day time limit expired. Thus, the government's claim in this section is not time barred.

Section 1592(e) provides:

> District court proceedings. –Notwithstanding any other provisions of law, in any proceeding in a United States district court commenced by the United States pursuant to section 1604 of this title for the recovery of any monetary penalty claimed under this section –
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> (1) all issues, including the amount of the penalty, shall be tried de novo;
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> (2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;

> (3) if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and
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> (4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

Since the penalty in this case is based on negligence, it is clear that the government has "the burden of proof to establish the act or omission constituting the violation." Once the government satisfies the burden, it shifts to the alleged violator to prove that the "act or omission did not occur as a result of negligence." Since this Court has ordered the material facts admitted, it remains to be determined whether those acts constituted a violation and, if so, whether that violation was a result of Menard's negligence.

As § 1592 applies to this case, Menard is liable if it negligently "enter[ed], introduce[d], or attempt[ed] to enter or introduce any merchandise into the commerce of the United States by means of –(i) any document, written or oral statement, or act which is material and false, or (ii) any omission which is material." 19 U.S.C. § 1592(a)(1)(A). This Court has held that "the measurement of the materiality of the false statement is its potential impact upon Customs determination of the correct duty for the imported merchandise." *United States v. Rockwell International Corp.*, 628 F.Supp. 206, 210 (C.I.T. 1986) (DiCarlo, J.). That measurement of materiality would also apply to a false statement by omission.

"A question of materiality involves a legal issue to be decided by the Court." *Id.* at 209. In this case, the amount of duties depended on the appraised value of the imported merchandise. Customs was not advised that the declared purchase prices and entered values were not based entirely on direct payments. Their appraisal was based upon declared prices and entered values which had in fact been lowered by deductions of amounts defendant alleges were owed to them by the exporter. As a result, the duties which were assessed were lower than those due on the purchase price of the goods, which in fact included indirect payments.

Understated prices in customs entry documents are material because they alter the appraisement and liability for duty of entered merchandise. Thus, the statements, or omissions, by Menard were material because they resulted in a loss of revenue to the United States.

The Court must next determine whether the material act or acts which caused the loss of revenue resulted from Menard's negligence. Menard admits that it failed to declare the indirect payments, or credit taken for previously imported defective merchandise. It justifies that action by claiming that its "System of accounting for defective merchandise" consists of negotiating credits on later shipments from the vendor rather than filing protests to receive duty refunds.

The government claims that Menard failed to exercise any care to ensure that this was the proper method of declaration under the circumstances. A cursory review of applicable customs regulations would have apprised Menard that it should have declared the indirect payments, and left the determination of their propriety to Customs. Menard's failure to declare the actual prices of the merchandise prior to subtraction of credit due was incorrect.

Only a modicum of care would have been needed to ascertain the proper method for obtaining allowances for duties paid on damaged or defective merchandise. Menard's failure to request and receive the allowance was due to its negligent disregard of the applicable regulations. The government asserts that "[c]ertainly, importers are not permitted to keep a 'running tally' on the amount of duties to be paid by crediting overpayment upon the next shipment and entry of merchandise." *Plaintiff's Cross-Motion for Partial Summary Judgment* at 17.

Despite Menard's claims, this Court finds that the obligation to make a proper inquiry into the regulations is not unrealistic or burdensome. If the importer is not able to make such a determination on its own, the question could be resolved without excessive effort by obtaining professional advice. The importer has the duty to ascertain the correctness of its private methods of altering declared value. Determination of the price of the merchandise by its own standards, and declaration of the same in disregard of the regulations, is not acceptable. The Court finds that Menard failed to exercise due care in determining the proper method of declaring the value of the subject entries. Thus, the material acts resulting in the loss of revenue were caused by Menard's negligence.

Finally, Menard claims that it is entitled to recoupment against the government's claim for lost duties, based upon the duties overpaid on the previously imported, allegedly defective merchandise.

"*Recoupment* is a demand arising from the same transaction as the plaintiff's claim." 3 *Moore's Federal Practice* § 13.02 (2d Ed. 1991). It "arises out of the transaction sued on [and] is the basis of a compulsory counterclaim." *Id.* The United States Supreme Court has held:

> The essence of the doctrine of recoupment is stated in the *Bull* case: "recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded." 295 U.S. 247, 262. It has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole.

Rothensies v. Electric Battery Co., 329 U.S. 296, 299 (1946). *See also Bull v. United States*, 295 U.S. 247 (1935).

This Court has found that:

> Recoupment is in the nature of a defense. It requires no waiver of sovereign immunity because the government necessarily consents to adjudication of the entire transaction when it files suit with re-

> gard to that transaction. * * * Recoupment implies a balancing of credits. Therefore both plaintiff's and defendants' claims must give rise to the same type of relief. * * * [R]ecoupment requires that plaintiff's and defendants' claims involve the same transaction.

United States v. Gold Mountain Coffee, Ltd., 601 F.Supp. 215, 217–18 (C.I.T. 1984). *See also United States v. Lun May Co., Inc.*, 652 F.Supp. 721,723–24 (C.I.T. 1987).

Under Rule 13(e) of the Rules of the Court of International Trade, "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment." However, failure to properly assert a counterclaim is not the issue in this case. The recoupment counterclaim may not be allowed because it is inappropriate. Defendant Menard is not entitled to recoupment against this government claim as it does not arise from the same transaction, or involve the same merchandise, as that which defendant claims gave rise to the overpayment. In fact, Menard fails to identify the merchandise upon which the claim for "credit" is based. Recoupment, which arises out of some feature of the transaction upon which plaintiff's action is grounded, does not allow one transaction to be offset against another. It permits the subject transaction to be examined in all its aspects, in order for the judgment to do justice to what are facets of one transaction as a whole.

Menard admits that its recoupment claim does not involve the same merchandise covered by this complaint, and that it negotiated credits on later shipments to account for previously shipped defective merchandise. It appears that the sole common factor between the transactions which Menard alleges is that the merchandise comprising this transaction was ordered at the same time Menard applied for credit for the previously imported allegedly defective merchandise. That does not transform them into a single transaction for recoupment purposes.

For the reasons stated above, it is hereby ORDERED that defendant's motion for summary judgment is DENIED, and plaintiff's cross-motion for partial summary judgment is GRANTED.

(Slip Op. 92–82)

TECHSNABEXPORT, LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND AD HOC COMMITTEE OF DOMESTIC URANIUM PRODUCERS, ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 92–04–00248

[Motion for preliminary injunction denied.]

(Dated May 21, 1992)

Hogan & Hartson, (William A. Bradford, Jr., Lewis E. Leibowitz, Steven J. Routh and *T. Clark Weymouth), Frank J. Fahrenkopf, Jr.*, of counsel, for plaintiffs Techsnabexport Ltd., NUEXCO Trading Corp. and Globe Nuclear Services and Supply GNSS.

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman, Neil R. Ellis, Jonathan A. Knee* and *Susan M. Matthews*) for plaintiffs Ukraine and Republic of Tajikistan.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, United States Department of Justice, Civil Division (*Jane E. Meehan* and *Marc E. Montalbine*), *David W Richardson*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, of counsel, for defendants.

Akin, Gump, Hauer & Feld (*Valerie A. Slater* and *Nicholas D. Giordano*), for defendant-intervenors.

OPINION

RESTANI, *Judge:* Pursuant to Rule 65(a) of the rules of this court, Ukraine, the Republic of Tajikistan, Techsnabexport Ltd. ("TENEX"),[1] NUEXCO Trading Corporation ("NUEXCO") and Globe Nuclear Services and Supply GNSS ("GNSS") (collectively "plaintiffs"),[2] request the court to grant a preliminary injunction enjoining the Department of Commerce, International Trade Administration ("Commerce"), from continuing its less than fair value ("LTFV") investigation initiated in *Initiation of Antidumping Duty Investigation: Uranium from the Union of Soviet Socialist Republics*, 56 Fed. Reg. 63,711 (Dep't Comm. Dec. 5, 1991), until the court renders final judgment on plaintiffs' request for permanent injunctive relief and declaratory judgment.[3]

Plaintiffs allege that Commerce's March 24, 1992 decision to continue the investigation violates the antidumping law and is causing, and will continue to cause, immediate and irreparable injury to plaintiffs. Plaintiffs argue that the antidumping investigation was initiated on the basis of uranium imports from the Union of Soviet Socialist Republics ("USSR") and since that country has ceased to exist, there can be no future imports at LTFV. The essence of the dispute is plaintiffs' contention that Commerce cannot apply the results of its investigation of past imports from one country (the USSR) to future uranium imports from other countries (the twelve constituent republics). Defendant and defendant-intervenors oppose the motions on both substantive and jurisdictional grounds.

BACKGROUND

On November 8, 1991, the Ad Hoc Committee of Domestic Uranium Producers and the Oil, Chemical and Atomic Workers International Union ("petitioners") filed a petition with Commerce and the International Trade Commission ("ITC") requesting initiation of an antidumping duty investigation for imports of uranium products from the USSR and "each and every Republic which is * * * a member" of the USSR.[4] On December 5, 1991, Commerce published notice in the *Federal Register* that

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[1] On January 27, 1992, Techsnabexport Ltd., a joint stock company registered in the Russian Federation, replaced V/O Techsnabexport, an all-union export sales and marketing organization.

[2] Although Energy Fuels Nuclear, Inc. is apparently not a party to this action, it is mentioned as a respondent in TENEX's submissions to Commerce.

[3] On May 11, 1992, the court consolidated Court No. 9204–00243, an action brought by the sovereign plaintiffs with Court No. 92–04–00248, an action brought by the nonsovereign plaintiffs, TENEX, the sole official exporter during the period of investigation, NUEXCO, the sole U.S. importer during the period of investigation and GNSS. On that same date, the court denied a motion to intervene filed by the Russian Federation as untimely.

[4] In their petition, petitioners stated their intent to include each of the individual republics so that if any of the republics withdrew from the USSR, the domestic industry would not be denied relief.

it was initiating an antidumping duty investigation of uranium imports from the USSR. 56 Fed. Reg. 63,711. The period of investigation covered imports of uranium from June 1991 through November 1991.

On November 19, 1991, ITC published notice that it was initiating its preliminary investigation. *Uranium from the USSR*, 56 Fed. Reg. 58,397 (Int'l Trade Comm. Nov. 19, 1991). On December 23, 1991, ITC made a preliminary affirmative injury determination. *Uranium from the USSR*, USITC Pub. 2471, Inv. No. 731–TA–539 (Dec. 1991).

During the last several months of 1991, the USSR rapidly moved toward dissolution. Tajikistan declared its independence on September 9, and the Ukraine voted in favor of independence on December 1. The USSR ceased to exist on December 25, 1991. In view of the dissolution of the USSR, counsel for TENEX, NUEXCO and GNSS ("company respondents" or "company plaintiffs") requested on January 10, 1992, that Commerce terminate the investigation. While this matter was pending, Commerce issued questionnaires to the company respondents on January 16 and received the responses on February 21 and 28, and March 13.

During the last weeks of January, Commerce also issued questionnaires to the twelve newly-created republics. These questionnaires were sent to the Deputy Trade Representative of the Russian Federation in Washington, D.C.[5] Commerce stated that it expected that the Deputy Trade Representative would transmit the copies to each of the new republics. Upon the refusal of the Russian Deputy Trade Representative to assume responsibility for proper delivery of the questionnaires to the republics, Commerce sent a copy of the questionnaire to the United Nations Mission of Ukraine.[6] For the other countries, including Tajikistan, it sent copies to the U.S. Embassy in Moscow, to be delivered to the countries' permanent representatives to the Russian Federation.[7]

On March 24, 1992, Commerce issued an internal memorandum that stated its intent to continue the investigation against the independent republics. In this memorandum, Commerce stated that the antidumping law does not require rescission of an investigation when the country named in the petition ceases to exist. Commerce found no statutory guidance on this specific issue, but noted that termination of the investigation would create a gap in the coverage of the antidumping law between the time of termination and the time petitions were filed against the new countries.

On April 1, 1992, Commerce published notice that it was extending the deadline for the preliminary determination in this matter until May 18, 1992 because the investigation was "extraordinarily complicated."

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[5] Commerce submitted these questionnaires to the Russian Embassy under the assumption that the Russian Embassy was acting as liaison with the independent republics.

[6] The questionnaire letter was dated January 29, 1992. In a letter dated February 3, 1992, Ukraine acknowledged receipt of the questionnaire.

[7] Tajikistan received a copy of the questionnaire in mid-February through its authorized representative to the Russian Federation.

Postponement of Preliminary Antidumping Duty Determination: Uranium from the Former Union of Soviet Socialist Republics (USSR), 57 Fed. Reg. 11,064, 11,065 (Dep't Comm. Apr. 1, 1992). Commerce explained that it had been very difficult to communicate with the new republics. Commerce also restated its intention to continue the investigation.

On March 30, 1992, Commerce mailed the petition, initiation notice, questionnaire, and other memoranda to the governments of the independent republics. The permanent representatives of the independent states in Moscow were also served by hand with most of these documents. The deadline for submitting information was extended to April 15. The sovereign plaintiffs in this action have not responded to the questionnaires.

DISCUSSION

1. This court's jurisdiction under 28 U.S.C. § 1581(i):

Plaintiffs carry the burden of demonstrating that jurisdiction exists. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Smith Corona Group, SCM Corp. v. United States*, 8 CIT 100, 102, 593 F. Supp. 415, 417–18 (1984). In this case, plaintiffs argue that the court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (4), which sets forth the court's residual jurisdiction.[8] Defendants maintain that plaintiffs have an adequate remedy under 28 U.S.C. § 1581(C).[9] That is, if the investigation ultimately results in a final affirmative antidumping duty determination and an antidumping duty order is published, plaintiffs will have an opportunity to contest Commerce's decision to continue the investigation. That decision would be subsumed in the final appealable de-

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[8] 28 U.S.C. § 1581(i) provides as follows:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (1988).

[9] Pursuant to 28 U.S.C. § 1581(C), this court has jurisdiction over all actions commenced under § 516A of the Tariff Act of 1930. Section 516A of the Tariff Act of 1930 as amended, 19 U.S.C. § 1516a provides, in part, as follows:

Judicial review in countervailing duty and antidumping duty proceedings * * *

(B) Reviewable determinations.

The determinations which may be contested under subparagraph A are as follows:
(i) Final affirmative determinations by the administering authority and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).
(ii) A final negative determination by the administering authority or the Commission under 1671d or 1673d of this title, including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.
(iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title.
(iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded.
(v) An injurious effect determination by the Commission under section 1671c(h) or 1673c(h) of this title.

Continued

termination. Plaintiffs respond by arguing that post-investigation judicial review pursuant to 28 U.S.C. § 1581(c) is manifestly inadequate because mere continuation of the investigation will cause irreparable harm whether or not the final determination is adverse.

Section 1581(i)(4) may be invoked as a basis for subject matter jurisdiction when another subsection of § 1581 is unavailable or the remedy provided by the other subsection is "manifestly inadequate." *See National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). Such residual jurisdiction is available if Congress has not defined another avenue for judicial review or if Congress has not precluded it entirely. *See Macmillan Bloedel Ltd. v. United States*, 16 CIT ____, ____, Slip Op. 92–67 at 3–4 (May 8, 1992). Although jurisdiction is limited in cases where the complainant seeks relief during the pendency of an investigation and the determination is finally reviewable under 28 U.S.C. § 1581(c), *see id.* at ____, Slip Op. 92–67 at 4, jurisdiction to review interim decisions has been found when failure to review the interim determination will effectively preclude review. *See id.* at ____, Slip Op. 92–67 at 3–4.

The United States does not seriously dispute that *Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 13 CIT 584, 717 F. Supp. 847 (1989), *aff'd*, 903 F.2d 1555 (Fed. Cir. 1990), and *Carnation Enterprises v. United States Dep't of Commerce*, 13 CIT 604, 719 F. Supp. 1084 (1989), require that the court take jurisdiction. In *Asocoflores*, the court found jurisdiction under § 1581(i) where plaintiff sought to enjoin Commerce from proceeding with an allegedly unlawful administrative review. Plaintiffs, numerous small businesses, alleged hardship in expending time, effort and money to participate in the review. The court found that the remedy afforded after the final determination (under § 1581(c)) was manifestly inadequate because, by that time, plaintiffs' challenge would be moot. 13 CIT at 586–87, 717 F. Supp. at 850. Significantly, the court noted that Commerce's decision to initiate the review was neither a preliminary decision that would be superseded by a final determination, nor was it a decision related to methodology or procedure that could be reviewed effectively following the final determination. *Id.* at 587, 717 F. Supp. at 850. The reasoning of *Carnation* is not dissimilar. The *Carnation* court found jurisdiction under § 1581(i) because eventual standing under § 1581(c) was speculative and therefore manifestly inadequate. *Carnation*, 13 CIT at 611, 719 F. Supp. at 1090–91.

(vi) A determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

(3) Exception. – Notwithstanding the limitation imposed by paragraph (2)(A)(i)(II) of this subsection, a final affirmative determination by the administering authority under section 1671d or 1673d of this title may be contested by commencing an action, in accordance with the provisions of paragraph (2)(A), within thirty days after the date of publication in the Federal Register of a final negative determination by the Commission under section 1671d or 1673d of this title.

19 U.S.C. § 1516a (1988).

The United States likens this case to challenges for failure to exclude a party from an investigation. *See e.g., Macmillan Bloedel*, 16 CIT ___, Slip Op. 92–67. A decision to exclude a particular party was one of the ordinary discretionary decisions based on particular fact patterns envisioned by Congress when it enacted 28 U.S.C. § 1581(c). Such decisions ordinarily do not call into question the underlying validity of the entire investigation, as does the case at hand. Section 1581(i)(4) was enacted to ensure judicial review in the Court of International Trade for various situations involving import laws for which Congress expected judicial review, but which were too unique or varied for specific definition. *See American Ass'n of Exporters & Importers v. United States*, 751 F.2d 1239, 1245–46 (Fed. Cir. 1985). Decisions not to exclude or not to investigate exclusion requests do not bear these hallmarks, and they are distinguishable from the case at hand.

As the parties apparently recognize, this action is similar to *Carnation* and *Asocoflores* in that plaintiffs challenge the legality of the proceedings, rather than particular determinations within the proceedings, and demand to be relieved of the obligation to participate in proceedings they find statutorily and constitutionally infirm. Furthermore, there is no guarantee that an adverse appealable decision will result from these proceedings. Stare decisis counsels adherence to prior determinations of this court which hold that jurisdiction exists to hear challenges to the validity of antidumping proceedings prior to their completion if the opportunity for full relief may be lost by awaiting the final determination.[10] *See American Lamb Co. v. United States*, 9 CIT 260, 262, 611 F. Supp. 979, 981 (1985) (stare decisis counsels court to follow prior decisions), *remanded* 785 F.2d 994 (1986); *see also Nissan Motor Corp. v. United States*, 10 CIT 820, 822, 651 F. Supp. 1450, 1453 (1986) (§ 1581(i) jurisdiction exists to determine if administrative review may continue; preliminary injunction denied).

Defendants have also raised the argument that there has not been an exhaustion of administrative remedies. The court has found that under the facts at hand further exhaustion is not required as a statutory prerequisite to § 1581(i) jurisdiction. The remaining question is whether further exhaustion is required As a discretionary matter. Under the exhaustion of remedies doctrine, "judicial review of administrative action is inappropriate unless and until the person seeking to challenge that action has utilized the prescribed administrative procedures for raising

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[10] Cases such as *Norcal/Crosetti Foods, Inc. v. United States*, 1992 WL 87850 (Fed. Cir. May 4, 1992) and *Conoco Inc. v. United States Foreign-Trade Zones Board*, 16 CIT ___, Slip Op. 9250 (Apr. 7, 1992), cited by the United States, are distinguishable. Those cases involved §§ 1581(h) and 1581(a) jurisdiction respectively. 28 U.S.C. § 1581(h) spells out specific procedures to be followed in the case of pre-importation review, which the *Norcal/Crosetti* court held could not be avoided for reasons of mere inconvenience. *Norcal/Crosetti*, 1992 WL 87850 at 5. In *Conoco*, the court found § 1581(a) was an available avenue of relief. *See* 16 CIT at ___, Slip Op. 92–50 at 18. To the extent that Conoco is applicable and in conflict with such cases as *Nissan Motor Corp. v. United States*, 10 CIT 820, 651 F. Supp. 1450 (1986), *Carnation* and *Asocoflores*, the court will apply the earlier, more specifically applicable, cases. The Court of Appeals has neither effectively overruled the earlier cases nor declared 28 U.S.C. § 1581(i) moribund. *See e.g., Asocoflores*, 903 F.2d at 1558 (since preliminary injunction denied, unnecessary to consider government's argument that any judicial review must await final decision); *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988) (finding it unnecessary to consider government's contention that judicial review of the methods used in administrative review must await final decision where court refused to grant preliminary injunction based on lack of irreparable injury).

the point." *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988). Sovereign plaintiffs contend that exhaustion of administrative remedies is not required in this case because the essence of the harm is *participation* in the investigation; to compel them to participate and appeal only after a final determination would effectively nullify any remedy as to their participation. Company plaintiffs have raised the issue of termination of the investigation with Commerce and are participating in the proceedings.

The statutory provision governing exhaustion in actions commenced under § 1581(i) is 28 U.S.C. § 2637(d), which provides that the court shall require exhaustion of administrative remedies "where appropriate." 28 U.S.C. § 2637(d) (1988).[11] Plaintiffs in this case have established that they fall within an exception to the doctrine. It is well settled that a plaintiff need not exhaust administrative remedies where invoking such remedies would be futile. *Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990) (citing *Bendure v. United States*, 554 F.2d 427, 431 (Ct. Cl. 1977)); *accord Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984). Any further attempt by plaintiffs to gain from Commerce the desired relief – immediate termination of the investigation – would be futile because this issue was raised and Commerce has decided this issue with finality and is continuing to do the very thing which causes the allegedly irreparable injury. Commerce has already concluded that it will continue its investigation of uranium from the USSR for the purpose of determining liability of imports from the independent republics; the administrative decision-making process regarding this issue has been completed.

In short, the issue of statutory authority to proceed has been resolved by the administrative agency as definitively as is possible. These are not procedural and methodological issues which are yet to be decided in a final form by the agency. No further exhaustion of administrative remedies is required.

2. Injunctive relief:

In order to grant plaintiffs' request for preliminary relief, the court must balance the following four factors: 1) likelihood of success on the merits; 2) the threat of immediate irreparable harm if the requested relief is denied; 3) the balance of the hardships on the parties; and 4) the public interest in issuing the requested relief. *Matsushita Elec. Industrial Co. v. United States*, 823 F.2d 505, 509 (Fed. Cir. 1987). The court denies preliminary injunctive relief because irreparable harm has not been demonstrated, the balance of hardships does not tip in plaintiffs' favor and it is not in the public interest to grant preliminary relief.

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[11] Specifically, this provision provides:

> In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.

28 U.S.C. § 2637(d) (1988).

The plaintiffs allege irreparable harm based on deprivation of constitutional due process rights. Deprivation of constitutional rights has been found to constitute irreparable harm sufficient to require immediate relief. *See e.g., Bowman v. Township of Pennsauken*, 709 F. Supp. 1329, 1348 (D. N.J. 1989) (equal protection and due process violations establish irreparable harm); *Cate v. Oldham*, 707 F.2d 1176, 1188–89 (11th Cir. 1983) (violation of First Amendment rights constitutes irreparable injury). In considering the procedural due process issue, the court must first determine whether a protected property or liberty interest exists, and if such an interest exists, then determine what procedures are necessary to protect that interest. *See e.g., American Ass'n of Exporters & Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985); *Johnston-Taylor v. Gannon*, 907 F.2d 1577, 1581 (6th Cir. 1990).

The Court of Appeals for the Federal Circuit has noted that for an interest to be protected by the Constitution, it must be "some interest worthy of protecting." *American Ass'n of Exporters*, 751 F.2d at 1250. Plaintiffs do not argue that a property right to import merchandise exists. *See The Abby Dodge v. United States*, 223 U.S. 166, 176–77 (1912); *Arjay Associates, Inc. v. Bush*, 891 F.2d 894, 896 (Fed. Cir. 1989). Instead, company plaintiffs argue that the property interest at stake is their interest in avoiding "damaged business relationships, lost sales and arbitrary antidumping duties." *See* Company Plaintiffs' Brief at 51–52. Sovereign plaintiffs base their argument on the antidumping statute which they claim supports the proposition that "interested parties" in antidumping proceedings have a protected interest in access to the United States market. *See* Sovereign Plaintiffs' Brief at 48, *citing* 19 U.S.C. §§ 1677(9)(A); 1677(9)(B) (1988). Defendants maintain that plaintiffs have no constitutionally protected property interest.

In *American Ass'n of Exporters*, the appellate court found that a trade association representing domestic importers and retailers of textile and apparel products had no right to challenge on due process grounds certain actions taken by the government pursuant to international agreements. The court noted that "[t]hose seeking constitutional protection under the due process clause must point to a 'legitimate claim of entitlement' prior to any consideration of the Government's constitutional obligations." 751 F.2d at 1250 (citing *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974)). The court then found that no statute or international agreement gave the importers a proprietary interest, and the government had not taken any merchandise from the importers. Emphasizing that the government had merely limited the amount which importers could purchase in the future, the court stated that "mere subjective expectation of a future business transaction does not rise to the level of an interest worthy of constitutional protection." *Id.* (citing *Perry v. Sinderman*, 408 U.S. 593, 603 (1972)). Thus, allegations of possible lost business in the future do not form the basis of a property interest warranting protection under the Constitution.

Likewise, the "interested party" provision of the antidumping law does not create any interest in or right to access the United States market. *See* 19 U.S.C. §§ 1677(9)(A); 1677(9)(B) (1988). Rather, it defines who may participate in an antidumping investigation, and establishes statutory procedural requirements for the conduct of an antidumping proceeding. It is far from clear that a constitutional property right may be derived from this provision of the antidumping laws.

Several cases in this court, however, have recognized, without detailed explanation of the property interest involved, that due process rights stem from statutes involving imports. *See e.g., Koyo Seiko Co. v. United States*, 16 CIT ____, ____, Slip Op. 92–72 at 14–15 (May 15, 1992) (excessive delay by Commerce in completing final determination; implicitly finding due process violation); *PPG Industries v. United States*, 13 CIT 183, 189–90, 708 F. Supp. 1327, 1331–32 (1989) (plaintiff opposed Commerce's motion to supplement administrative record claiming due process violation under Fifth Amendment; remanding and noting "in order for judicial review on the basis of the administrative record to be meaningful under the due process clause * * * the creation and maintenance of the record itself must include adherence to the procedures which Congress has set out in the statutes"); *Lois Jeans & Jackets v. United States*, 5 CIT 238, 243, 566 F. Supp. 1523, 1527–28 (1983) (lack of notice and opportunity to comment are so fundamentally prejudicial as to constitute due process violation).

Even assuming that plaintiffs could establish the existence of some constitutionally protected property right based upon present business interests or statutory rights, plaintiffs failed to prove the existence of constitutional harm. Procedural due process is not an inflexible, absolute standard. *See Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). As this court has recognized, the essential elements of due process are notice and the opportunity to be heard. *See Barnhart v. United States Treasury Dep't*, 7 CIT 295, 303, 588 F. Supp. 1432, 1438 (1984) (quoting *Black's Law Dictionary* 449 (5th ed. 1979)). "The test is one of fundamental fairness in light of the total circumstances." *Id.* In other words, in calculating the constitutional sufficiency of notice, the court must examine all of the circumstances and make a determination based upon the reasonableness of the notice and participation. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The court finds that the notice and opportunity to be heard and to participate in the proceedings afforded plaintiffs meet constitutional standards.[12]

First, if a property right exists, it is not the type of interest which is so vital that the most stringent type of process must be provided. *See Mathews v. Eldridge*, 424 U.S. 319, 341–43 (1976) (nature of process required depends on degree of deprivation). Second, adequate process was pro-

[12] At this time, the court does not reach the issue of whether the procedures are adequate in statutory terms.

vided. The petition gave notice of intent to reach exports from the republics as well as the USSR, and the proceedings have been sufficiently delayed so that plaintiffs have had adequate notice[13] and opportunity to participate,[14] although the sovereign plaintiffs have thus far rejected that option. Any deprivation of an early opportunity for informal government-to-government consultations, as is alleged by the sovereign plaintiffs, is not a harm sufficient to offend the Constitution.[15] Moreover, Commerce has delayed issuing the preliminary determination, granting plaintiffs the opportunity to participate in the investigation to the fullest extent. Sovereign plaintiffs have chosen to remain silent, refusing to cooperate with Commerce in this matter.

The sovereign plaintiffs argue further that by continuing this investigation Commerce has placed them in an inferior position which could permanently damage their credibility in the world trading community. This contention is nothing more than a general allegation of harm, lacking even the support of an affidavit. The court may not grant preliminary relief based upon unsupported allegations.

As proof of irreparable injury, company plaintiffs have submitted affidavits alleging that because of the ongoing proceedings government officials of the independent republics are hesitant to establish long term business relationships with the company plaintiffs because they are afraid of adverse effects on their ability to export their uranium to the United States through the company plaintiffs. Allegations of harm to potential future business relations are too speculative to constitute irreparable harm. Company plaintiffs have not put forth "probative evidence" demonstrating irreparable harm. *See Nat'l Hand Tool Corp. v. United States*, 14 CIT ___, ___, Slip Op. 90–12 at 11 (Feb. 9, 1990).[16]

As to the balance of hardships, at this point it is impossible to determine if it is plaintiffs or the petitioning domestic industry which is suffering the greater harm. The domestic industry has endured numerous delays in its quest to obtain relief. There seems to be no dispute that it is beleaguered. Rather, plaintiffs allege that the domestic industry is not simply beleaguered but dead and, therefore, logically can suffer no harm. The court has been presented insufficient evidence to resolve this matter. As plaintiffs have the burden on this issue, the hardships are presumed to balance. Even if the court is in error with respect to the issue of irreparable harm based on constitutional deprivation, plaintiffs have demonstrated no hardship which would warrant preliminary relief.

Finally, the court must consider the public interest. The issues of statutory interpretation involved here are extremely complicated and of

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[13] The court notes that all plaintiffs had both constructive and actual notice of the investigation. *See supra* nn. 5–7, and accompanying text.

[14] Several times Commerce extended the deadline for plaintiffs to respond to the questionnaires.

[15] The sovereign plaintiffs also note the preliminary ITC determination which occurred prior to dissolution of the USSR. How ITC might or could respond to the issue of dissolution or participation of the republics has not been addressed. Thus, at the present time this would appear an inappropriate basis on which to find constitutional harm.

[16] Company plaintiffs may not allege constitutional violations based on the rights of third parties.

great importance to all of the parties, sovereign and otherwise. In view of the lack of imminent irreparable harm or demonstrable hardship, it is inappropriate to resolve them in a hurried manner[17] or according to a likelihood of success on the merits standard. They should be definitively resolved as soon as possible.

Accordingly, plaintiffs' motion for preliminary injunctive relief is denied. The parties shall consult on a further briefing schedule. The results of such consultation shall be reported to the court within ten days of the date of this opinion.

(Slip Op. 92–83)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 90–06–00313

Plaintiff moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record and moves to remand this action to the International Trade Administration with instructions to recalculate the dumping margin. Specifically, plaintiff challenges the International Trade Administration's allocation of Koyo's export sales department expenses, choice of best information available, calculation of a difference in circumstance of sale adjustment to constructed value, failure to deduct profit from Exporter Sales Price, a computer programming error in matching sales of identical merchandise for Koyo, application of a twenty percent cap on cost in the model selection process and use of the provisional duty assessment cap.

Held: Plaintiff's motion is hereby granted in part and this proceeding is remanded to the International Trade Administration for recalculation of the dumping margins using verified data as best information available for Koyo's export department expenses, for the application of the twenty percent cost cap at the end of the process of selecting "such or similar" merchandise and to instruct the United States Customs Service not to apply the provisional duty assessment cap. Plaintiff's motion is denied in all other respects.

[Plaintiff's motion for judgment on the agency record granted in part and denied in part. Proceeding remanded to International Trade Administration for recalculation of dumping margins.]

(Dated May 22, 1992)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen, Vincent J. Branson, Patrick J. McDonough* and *Amy S. Dwyer*); of counsel: *Scott A. Scherff,* Managing Attorney, The Timken Company, for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *Joan L. MacKenzie*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman, Richard Belanger, Susan P. Strommer, Neil R. Ellis, T. George Davis, Susan E. Silver, Eric G. Stockel, Robert Tor-*

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[17] At the start of this litigation, Commerce gave May 18, 1992, as the date for issuance of the preliminary determination. The court has been informed that this date has been postponed to May 28, 1992.

resen, Jr., Niall P. Meagher, Jonathan A. Knee and *Barbara D. A. Eyman*) for defendant-intervenor Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Donohue and Donohue (*Joseph F. Donohue, Jr., James A. Geraghty, Kathleen C. Inguaggiato* and *Daniel W. Dowe*) for defendant-intervenor NSK Ltd. and NSK Corporation.

OPINION

TSOUCALAS, *Judge:* This Court is called upon to examine the conclusions of the Commerce Department, International Trade Administration ("ITA"), in its first administrative review of tapered roller bearings ("TRBs") from Japan produced by Koyo Seiko Co., Ltd., Koyo Corporation of U.S.A. ("Koyo"), NSK Ltd. and NSK Corporation ("NSK"). *Tapered Roller Bearings Four Inches or Less in Outside Diameter From Japan; Final Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 22,369 (1990) ("Final Results"). These Final Results cover the period from April 1, 1974 through March 31, 1979 for Koyo and April 1, 1974 through July 31, 1980 for NSK. Plaintiff in this case, The Timken Company ("Timken"), moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record and remand to the ITA for recalculation of dumping margins.

BACKGROUND

This case comes before the Court for decision along with two related cases, all challenging the ITA's Final Results on various grounds. This decision is to be considered in conjunction with the Court's opinions in *Koyo Seiko Co. v. United States*, 16 CIT ____, Slip Op. 92–72 (May 15, 1992), and *NSK Ltd. v. United States*, 16 CIT ____, Slip Op. 92–79 (May 21, 1992). This Court's opinions in these related cases directly impact on the outcome of this case.

Refer to this Court's opinions in *Koyo Seiko Co.*, 16 CIT ____, Slip Op. 92–72, and *NSK Ltd.*, 16 CIT ____, Slip Op. 92–79, for a comprehensive history of the circumstances surrounding this action.

Plaintiff Timken's allegations in this action are as follows: (1) in calculating Koyo's export selling expenses, ITA erroneously relied on unverified data; (2) ITA erred in its selection of "best information otherwise available" to replace information not supplied by respondents; (3) ITA's adjustment of constructed value for "difference in circumstance of sale" was contrary to law and unsupported by substantial evidence; (4) ITA's failure to deduct importer's profit from Exporters Sales Price ("ESP") was improper and contrary to law; (5) ITA's computer programming instructions failed to implement its stated methodology of matching sales of identical bearings in the home and U.S. markets for Koyo: (6) ITA incorrectly implemented the "twenty percent cap" on difference in merchandise cost; and (7) ITA failed to instruct the U.S. Customs Service to collect the full amount of antidumping duties payable on entries made between June 5, 1974 and January 29, 1975.

Defendant ITA agrees with Timken's contentions in regard to the collection of full antidumping duties on entries made between June 5, 1974 and January 29, 1975 and in regard to the implementation of the

"twenty percent cap" on difference in merchandise cost. ITA requests the Court to remand this proceeding to them on these two issues and to sustain the ITA's actions in all other respects.

Defendant-intervenor Koyo supports remand of this action in regard to the alleged failure of the ITA's computer programming instructions to implement its stated methodology for matching sales of identical models in the home and U.S. markets for Koyo, and the ITA's incorrect implementation of the "twenty percent cap" on difference in merchandise cost. Koyo opposes Timken's motion for judgment on the agency record in regard to all other issues raised in this action.

Defendant-intervenor NSK opposes Timken's motion in regard to Timken's challenge of the ITA's choice of best information available where NSK did not provide requested information to the ITA, Timken's challenge of the ITA's adjustment to constructed value for differences in circumstances of sale and Timken's challenge of the ITA's failure to deduct importer's profits from ESP. NSK requests the Court to deny plaintiff's motion for judgment on the agency record and to dismiss this action.

For the reasons detailed below, the Court finds that the case must be remanded to the ITA to make corrections in its calculation of the dumping margins.

Discussion

The Court's jurisdiction over this matter is derived from 28 U.S.C. § 1581(c) (1988).[1]

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). Under this standard, the ITA is granted considerable deference "in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law." *Chemical Prods. Corp. v. United States*, 10 CIT 626, 628, 645 F. Supp. 289, 291, *remand order vacated*, 10 CIT 819, 651 F. Supp. 1449 (1986) (citations omitted).

I. *Calculation of Koyo's Export Selling Expenses:*

Plaintiff argues that the ITA used unsubstantiated and unverified information in calculating the deduction from ESP for export selling expenses by using Koyo's claimed allocation of its export department

[1] 28 U.S.C. § 1581(c) provides in pertinent part:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

expenses to U.S. sales.[2] Timken claims that Koyo did not substantiate this claimed allocation, and that the ITA did not verify it. Moreover, Timken claims that this unsubstantiated and unverified allocation should not have been used in calculating the deduction of export selling expenses from ESP when verified per-unit export expenses were available.

ITA and Koyo argue that the ITA is not required to verify every piece of information submitted to it citing *Monsanto Co. v. United States*, 12 CIT 949, 951, 698 F. Supp. 285, 288 (1988). ITA points out that it did verify Koyo's export department's expenses but reasonably chose not to verify, but to accept, Koyo's proposed allocation of those expenses.

While it is true that the ITA is not required to verify every piece of information submitted to it, it would seem that the ITA did in fact attempt to verify Koyo's proposed allocation methodology and was unable to do 60. The verification report for Koyo states:

> Koyo nevertheless allocated [ ] of total export expenses to U.S. exports. *This allocation was not substantiated.*

Administrative Record ("AR") (Pub.) Doc. 289 at 7 (emphasis added). ITA's preliminary analysis memorandum also states that Koyo's proposed allocation method was unsubstantiated. AR (Pub.) Doc. 387 at 16–17.

The preference for the use of verified information in the conduct of an administrative review, and for the use of best information available when verified information is unavailable, is clear from 19 U.S.C. § 1677e(b)(3) (1988).[3] There is also a preference for the use of verified data as best information available when the use of best information is necessary. This Court has supported this preference for the use of verified data as best information available. *See Smith Corona Corp. v. United States*, 15 CIT ____, ____, 771 F. Supp. 389, 399 (1991); *Hercules, Inc. v. United States*, 11 CIT 710, 754–55, 673 F. Supp. 454, 490 (1987).

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[2] In calculating exporter's sales price, 19 U.S.C. § 1677a(e)(2) (1988) requires the deduction of all selling expenses incurred with respect to U.S. sales:

> **(e) Additional adjustments to exporter's sales price.**
>
> For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of–
>
> * * * * * * *
>
> (2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise,
>
> * * * * * * *

[3] 19 U.S.C. § 1677e(b)(3) states in pertinent part:

> **(b) Verification.**
>
> The administering authority shall verify all information relied upon in making–
>
> * * * * * * *
>
> (3) a review and determination under section 1675(a) of this title,
>
> * * * * * * *
>
> If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action * * *.

See also 19 C.F.R. § 353.37 (1990).

In this administrative review the ITA also has shown a preference for using verified data instead of unverified data as best information available:

> As best information otherwise available, we used the information from the April 1978 to March 1979 period *because these data had been verified* in September 1979.

Final Results, 55 Fed. Reg. at 22,378 (Comment 42) (emphasis added);

> Koyo was unable to provide supporting documentation for data submitted prior to 1980 as confirmed at verification in December 1986. We used the 1978–1979 period data as best information otherwise available *because these data were verified.*

Id. at 22,379 (Comment 43) (emphasis added). *See also Porcelain-on-Steel Cooking Ware From Mexico; Final Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 21,061, 21,062 (1990)(Comment 8); *Television Receivers, Monochrome and Color, From Japan; Final Results of Antidumping Duty Administrative Review*, 53 Fed. Reg. 4050, 4052 (1988) (Comment 13).

ITA's use of unverified data for the allocation of Koyo's export department's expenses to U.S. sales as best information available, when verified per-unit export department expenses were available, was unsupported by substantial evidence on the record. This Court remands this proceeding to the ITA to use the verified per-unit export department expenses as best information available when calculating the adjustment to ESP for Koyo's export selling expenses.

II. *Best Information Available:*

Plaintiff challenges the ITA's choice of best information available for: (1) information not provided by Koyo necessary to split bearing components in order to compare similar merchandise; (2) information not provided by Koyo on variable costs of manufacture; and (3) for missing information on Koyo's aftermarket sales. Plaintiff also challenges the ITA's choice of best information available used when NSK failed to provide requested physical criteria data for certain U.S. sales.

ITA, Koyo and NSK argue that Timken failed to exhaust its administrative remedies in regard to these issues and so is barred from raising them here.

Exhaustion of administrative remedies is generally a prerequisite to challenging an administrative determination in this court. See 28 U.S.C. § 2637(d) (1988).[4] It is well established that "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *see also Rhone Poulenc,*

[4] 28 U.S.C. § 2637(d) states:

(d) In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.

Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Koyo Seiko Co. v. United States*, 15 CIT ____, ____, 768 F. Supp. 832, 835 (1991); *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT ____, ____, 773 F. Supp. 1549, 1554 (1991); *Alhambra Foundry*, 12 CIT at 346–47, 685 F. Supp. at 1255–56.

In its prehearing brief during the course of the administrative review, Timken supported those instances where the ITA decided to use best information available in the preliminary results. AR (Pub.) Doc. 416 at 22–29. However, Timken never took issue with the ITA's specific choices of which data to use as best information available. Timken made general statements that any data used as best information by the ITA should be adverse. *Id.*; AR (Pub.) Doc 422 at 92–96. Since the ITA's choices of data used as best information available were disclosed in its preliminary determination, Timken was required to specifically contest at the administrative level those choices with which it did not agree. ITA was never made aware that Timken had problems with the ITA's choice of data used as best information available and had no opportunity to address Timken's concerns and possibly rectify them, or at least explain its choices in greater detail. *Rhone Poulenc*, 889 F.2d at 1191 (rejection of argument that raising general issue of choice of best information available also raises specific issue of need for adjustment of data chosen); *see also Koyo Seiko Co.*, 15 CIT at ____, 768 F. Supp. at 835; *Budd Co.*, 15 CIT at ____, 773 F. Supp. at 1554; *Alhambra Foundry*, 12 CIT at 346–47, 685 F. Supp. at 1255–56.

This Court finds that Timken's failure to raise its problems with the ITA's choices of best information available for information not provided by Koyo necessary to split bearing components in order to compare similar merchandise, for information not provided by Koyo on variable costs of manufacture, for Koyo's missing aftermarket sales information, and for information which NSK failed to provide regarding requested physical criteria data for certain U.S. sales, bars Timken from raising those issues here. These specific choices of data used as best information available by the ITA are upheld to the extent that the use of best information available in these instances is still required during the recalculation of dumping margins required by this Court's decision in *Koyo Seiko Co. v. United States*, 16 CIT ____, Slip Op. 92–72 (May 15, 1992), and *NSK Ltd. v. United States*, 16 CIT ____, Slip Op. 92–79 (May 21, 1992).

III. *Difference in Circumstance of Sale Adjustment:*

Plaintiff takes this opportunity to once again challenge the ITA's grant of a difference in circumstance of sale adjustment in the calculation of constructed value.[5] ITA, Koyo and NSK argue that Timken failed to exhaust its administrative remedies in regard to this issue. However,

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[5] 19 U.S.C. § 1677b(e) (1988), which defines how to calculate constructed value, states in pertinent part:

(a) Constructed Value.

(1) Determination.

For purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—

Continued

Timken did raise the issue of the grant of a difference in circumstance of sale adjustment to constructed value during the administrative proceeding. AR (Pub.) Doc. 416 at 34.

Plaintiff points out that this Court has upheld the ITA's authority to perform difference in circumstance of sale adjustments in calculating constructed value. *Memorandum in Support of Plaintiff's Second Motion for Judgment on the Agency Record* ("Plaintiff's Motion") at 53; *see The Timken Co. v. United States* ("Timken III"), 14 CIT ____, ____, Slip Op. 90–117 at 8–10 (Nov. 5, 1990). Plaintiff agrees that this Court has also held that reduction of general expenses below the statutory ten percent of the cost of manufacture in the calculation of constructed value through the use of a difference in circumstance of sale adjustment may be reasonable and in accordance with law. *Plaintiff's Motion* at 53–54; *see The Timken Co. v. United States* ("Timken II"), 11 CIT 786, 798 n. 21, 673 F. Supp. 495, 508 n. 21 (1987). However, Timken argues that *Timken II* is no longer controlling and that this Court should follow the decision in *Zenith Elecs. Corp. v. United States*, 15 CIT ____, 770 F. Supp. 648 (1991). Timken believes that the Court's decision in *Zenith* stands for the proposition that, in calculating constructed value, general expenses may not be reduced below the statutory ten percent by a difference in circumstance of sale adjustment.

In *Zenith*, the Court found that the number of home market sales under investigation were insufficient to allow the ITA to calculate foreign market value. In other words, the home market in *Zenith* was found to be not viable and the ITA used only constructed value to calculate foreign market value. Therefore, sales expenses from that home market could not be used to reduce the statutorily required ten percent figure for general expenses. *Id.* at 656–57.

Zenith can clearly be distinguished on the facts from this case. Here there was clearly a viable home market and in many cases home market sales were used to calculate foreign market value. Only in situations where the ITA could not find home market sales of identical or similar bearings was constructed value used. Therefore, since the home market in this case was viable, the use of sales expenses from the home market for a difference in circumstance of sale adjustment which reduced gen-

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(A) the cost of materials * * * and of fabrication * * *;
(B) an amount for general expenses and profit * * *, except that –
(i) the amount for general expenses [shall not be less than 10 percent of the cost as defined in subparagraph (A) * * *.

ITA has implemented this statutory provision at 19 C.F.R. § 353.50 (1990).

19 U.S.C. § 1677b(a)(4) (1988), which sets out adjustments to be made to foreign market value, states in pertinent part:

(4) Other adjustments.

In determining Foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to –

* * * * * * *

(B) other differences in circumstances of sale;

* * * * * * *

then due allowance shall be made therefore.

ITA has implemented this statutory provision at 19 C.F.R. § 353.56 (1990).

eral expenses below ten percent of the cost of manufacture was reasonable and in accordance with law. *Timken II*, 11 CIT at 798 n. 21, 673 F. Supp. at 508 n. 21.

Timken also challenges the methodology used by the ITA to make this adjustment. Specifically, Timken alleges that the ITA's adjustment to constructed value for differences in circumstance of sale must be limited to indirect selling expenses. In this case, Timken alleges that the ITA's adjustment consisted of all general, administrative and selling expenses and not solely indirect selling expenses. ITA, Koyo and NSK argue that Timken failed to exhaust its administrative remedies by not raising this specific issue below.

As discussed above, exhaustion of administrative remedies is generally a prerequisite to challenging an administrative determination in this court. *See* 28 U.S.C. § 2637(d); *Koyo Seiko Co.*, 15 CIT at ____, 768 F. Supp. at 835; *Budd Co.*, 15 CIT at ____, 773 F. Supp. at 1554; *Alhambra Foundry*, 12 CIT at 346–47, 685 F. Supp. at 1255–56.

It is clear to this Court that this is precisely the type of issue which must be raised at the administrative level so it can be addressed by the ITA before it can be entertained here. Simply raising, at the administrative level, the broad issue of the correctness of the grant of a difference in circumstance of sale adjustment in calculating constructed value, as Timken did, and arguing that this implicitly raises specific issues as to how that adjustment is calculated is insufficient. *Cf. Rhone Poulenc*, 899 F.2d at 1191 (rejection of agreement that raising general issue of choice of best information available also raises specific issue of need for adjustment of data chosen).

Therefore, to the extent that an adjustment to constructed value for differences in circumstance of sale is necessary during the recalculation of the dumping margin required by this Court's opinion in *Koyo Seiko Co.*, 16 CIT ____, Slip Op. 92–72, the ITA's grant of an adjustment and method used for calculating that adjustment are sustained.

IV. *Deduction of Importer's Profit from ESP:*

Plaintiff challenges the ITA's decision not to deduct the profits of an importer from ESP. Timken maintains that the ITA is required to deduct the profits of an importer from its calculation of ESP under 19 U.S.C. § 1677a(e) (1) (1988).[6] Here plaintiff asserts a claim previously rejected by this Court on more than one occasion. *See Timken III*, 14 CIT ____, ____, Slip Op. 90–117 at 1112 (Nov. 5, 1990); *Timken II*, 11 CIT at 811–14, 673 F. Supp. at 518–21; *The Timken Co. v. United States* ("Timken I"), 10 CIT 86, 102–11, 630 F. Supp. 1327, 1341–48 (1986).

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[6] 19 U.S.C. § 1677a(e) states in pertinent part:

(e) Additional adjustments to exporter's sales price.

For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of –

(1) commissions for selling in the United States the particular merchandise under consideration, * * *.

Timken contends that the meaning of "commissions" under 19 U.S.C. § 1677a(e)(1) should be interpreted to include both normal sales commissions and the profits of importers.

Plaintiff presents no new information here which would lead this Court to reconsider an issue which would seem to be well settled. This Court finds, as did the courts in *Timken I*, *Timken II* and *Timken III*, that the ITA's interpretation of "the word 'commissions' to mean only commissions, and not 'commissions and profits,' is reasonable" and also in accordance with law. 14 CIT at ____, Slip Op. 90–117 at 12; *see also* 11 CIT at 814, 673 F. Supp. at 520–21; 10 CIT at 111, 630 F. Supp. at 1348.

V. *Identification of Sales of Identical Bearings:*

Timken and Koyo argue that the ITA's computer program for identifying sales of identical bearings in the home and U.S. markets failed to identify any identical bearings as being sold in both markets. However, they state that sales of identical bearings in both markets did occur. They argue that the ITA's failure to correctly identify sales of identical bearings was contrary to the ITA's stated intention to first match sales of identical bearings sold in both markets, if no sales of identical bearings were found to use sales of similar bearings and if no sales of similar bearings were found to use constructed value. Both Timken and Koyo argue that the ITA's computer program failed to accomplish its task because matches of identical sales were made solely on the basis of nomenclature and not, alternatively, on the basis of the information on the five physical criteria provided by Koyo.

Resolution of this issue is directly impacted by this Court's opinion in *Koyo Seiko Co. v. United States*, 16 CIT ____, Slip Op. 92–72 (May 15, 1992). In *Koyo*, this Court directed the ITA to recalculate Koyo's dumping margins by determining such or similar merchandise, when necessary, by using the three physical criteria methodology. *Koyo Seiko Co.*, 16 CIT at ____, Slip Op. 92–72 at 1214. Therefore the discussion below is done in the context of the ITA's applying the three physical criteria methodology, and not the five physical criteria methodology, upon remand in this case.

ITA argues that Timken failed to exhaust its administrative remedies by raising this issue during the underlying investigation. While it may be true that Timken did not raise this issue below, it is certain that Koyo did and that the ITA addressed it in its *Final Results*, 55 Fed. Reg. at 22,379 (Comment 47). The fact that it was another party that raised this issue below does not prevent Timken from challenging it here. *National Resources Defense Council v. U.S. E.P.A.*, 824 F.2d 1146, 1151 (D.C. Cir. 1987).

ITA further responds by stating that Koyo failed to submit home market sales data which used the same nomenclature as U.S. market sales data. ITA's intention was to make identical matches based on nomenclature. The use of the physical criteria methodology was solely for determining matches of sales of similar bearings when no identical matches could be found. ITA points out that use of the same nomencla-

ture for both home market and U.S. sales by a respondent was required, that Koyo was given numerous opportunities to correct this problem, but that they failed to do 80. AR (Pub.) Docs. 303, 322, 330, 338. As a result of the uncorrected nomenclature problem, the computer program preformed as intended, found no matches of identical sales, and proceeded where possible to make similar matches or to use constructed value.

ITA is granted considerable deference in "the methods it employs in administering the antidumping law." *Chemical Prods.*, 10 CIT at 628, 645 F. Supp. at 291. Here the ITA's computer instructions for matching identical sales of bearings were reasonable. The inability to find any identical matches lies with Koyo's failure to submit correctly formatted information as requested. Therefore, the ITA's use of nomenclature for matching identical sales for Koyo is sustained. ITA may use the same method on remand to identify identical sales before resorting to the use, when necessary, of the three physical criteria methodology for selecting such or similar merchandise as required in *Koyo Seiko Co.*, 16 CIT ____, Slip Op. 92–72.

VI. *Implementation of the "Twenty Percent Cap":*

Timken, the ITA and Koyo agree that this issue should be remanded to the ITA to correctly implement the use of the twenty percent cap on cost differences. NSK takes no position on this issue. This issue was decided by this Court's opinion in *Koyo Seiko Co.*, 16 CIT at ____, Slip Op. 92–72 at 17–18. Therefore, the Court remands this issue to the ITA to apply the twenty percent cap on cost differences in accordance with its opinion in *Koyo*.

VII. *Antidumping Duty Assessment Cap:*

Timken argues that the antidumping duty assessment cap contained in 19 U.S.C. § 1673f(a) (1988)[7] does not apply in this case. ITA agrees and asks for a remand on this issue. Koyo disagrees. NSK takes no position on this issue.

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[7] 19 U.S.C. § 1673f(a) provides:

(a) Deposit of estimated antidumping duty under section 1673b(d)(2) of this title.

If the amount of a *cash deposit* collected as security for an estimated antidumping duty under section 1673b(d)(2) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 1673d(b) of this title is published shall be–

(1) disregarded, to the extent the *cash deposit* collected is lower than the duty under the order, or
(2) refunded, to the extent the *cash deposit* is higher than the duty under the order.

(emphasis added).

19 U.S.C. § 1673b(d)(2) (1988) provides in pertinent part:

(d) Effect of determination by the administering authority.

If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority–

* * * * * * *

(2) shall order the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry of the merchandise concerned equal to the estimated average amount by which the foreign market value exceeds the United States price, * * *.

19 U.S.C. § 1673d(b) (1988) provides for final injury determinations by the U.S. International Trade Commission.

In support of their position, Timken and the ITA rely upon this Court's decision in *Zenith Elecs. Corp. v. United States*, 15 CIT at ____, 770 F. Supp. at 652–54. The Court in *Zenith* found that the clear language of the statute, coupled with the ambiguous language of the legislative history of this provision, led to the conclusion that the duty assessment cap contained in 19 U.S.C. § 1673f(a) applies only to cash deposits of estimated dumping duties. The Court concluded that the statute does not apply to a situation where the importer posted bonds to cover estimated dumping duties. Id. at ____, 770 F. Supp. at 654.

In this case, the time period in question was from June 5, 1974, the date Treasury published an affirmative determination of sales at less than fair value and withholding of appraisement notice, to January 29, 1975, the date the ITC published its affirmative injury determination. *Tapered Roller Bearings From Japan. Antidumping; Withholding of Appraisement Notice*, 39 Fed. Reg. 19,969 (1974); *Tapered Roller Bearings And Certain Components Thereof From Japan. Determination of Likelihood of Injury*, 40 Fed. Reg. 4,366 (1975). The applicable law during this time period was the Antidumping Act of 1921. Antidumping Act of 1921, 42 Stat. 11 *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144. The Antidumping Act of 1921 had no provision for the calculation of estimated dumping duties or for the use of a provisional assessment cap. As a result, Koyo was not required to deposit cash to cover any estimated antidumping duties.

Koyo argues that the Court's decision in *Zenith* does not apply in this case for two reasons. First, at the time of the Court's decision in *Zenith*, the ITA had not interpreted 19 U.S.C. § 1673f(a) through the promulgation of a regulation. Just prior to the Court's decision in *Zenith*, the ITA did promulgate such a regulation which applied the provisional assessment cap to both cash deposits and bonds. *See* 19 C.F.R. § 353.23 (1990) (promulgated at *Antidumping Duties Final Rule*, 54 Fed. Reg. 12,742 (March 28, 1989)). This regulation was in effect at the time the Final Results in this case were issued and was applied by the ITA.

Koyo argues that as a result of the lack of interpretation of the statute by the ITA, the Court in *Zenith* was not required to apply the deferential standard of review of an agency's construction of the statute which it implements, articulated in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842–45 (1984). *Chevron* requires a court to defer to an agency's "reasonable" or "permissible" interpretation of an ambiguous statute. *Id.* Koyo argues that this Court must apply the *Chevron* standard of review here and that doing so will lead the Court to disregard *Zenith* and uphold the ITA's regulation and its use here.

However, even the application of the deferential *Chevron* standard of review does not help Koyo because this Court finds the clear language of 19 U.S.C. § 1673f(a) excludes its application to situations other than those involving cash deposits. *See Zenith*, 15 CIT at ____, 770 F. Supp. at 652–53. The fact that the ITA promulgated a regulation, which it now informs the Court it intends to repeal, which supports Koyo's position is

insufficient grounds for this Court to uphold the regulation and disregard this Court's decision in *Zenith* if the regulation is clearly inconsistent with the language of the underlying law. *See Melamine Chems., Inc. v. United States*, 732 F.2d 924, 928 (Fed. Cir. 1984).

Koyo also argues that this Court's decision in *Zenith* is flawed because the Court relied on an incorrect version of the GATT Antidumping Code ("Code").[8] Even if the Court in *Zenith* incorrectly interpreted the Code, this would still be insufficient grounds to go beyond the clear language of this statutory provision. Even though one of the main purposes of the Trade Agreements Act of 1979 was to implement the results of the GATT Tokyo Round Negotiations, provisions of the Code are "clearly hortatory rather than mandatory." *Timken III*, 14 CIT at ____, Slip Op. 90–117 at 12.

Therefore, this Court chooses to follow *Zenith* and finds that 19 U.S.C. § 1673f(a) does not apply in the absence of cash deposits and remands this issue back to the ITA to eliminate the application of the provisional assessment cap.

CONCLUSION

In accordance with this opinion, this proceeding is remanded to the International Trade Administration for recalculation of the dumping margins using Koyo's verified per-unit export department expenses as best information available in the calculation of Koyo's export selling expenses, for application of the twenty percent cost cap in accordance with this Court's opinion in *Koyo Seiko Co. v. United States*, 16 CIT ____, Slip Op. 92–72 (May 15, 1992), and for the ITA to instruct the U.S. Customs Service not to apply the provisional duty assessment cap to entries made between June 5, 1974 and January 29, 1975. Furthermore, to the extent the use of best information available is necessary after the recalculation of the dumping margins required by this Court's opinions in *Koyo Seiko Co.*, 16 CIT ____, Slip Op. 92–72, and *NSK Ltd. v. United States*, 16 CIT ____, Slip Op. 92–79 (May 21, 1992), the ITA's choice of best information available for information not provided by Koyo necessary to split bearing components in order to compare similar merchandise, for information not provided by Koyo on variable costs of manufacture, for Koyo's missing aftermarket sales information, and for information which NSK failed to provide regarding requested physical criteria data for certain U.S. sales is sustained. Also, to the extent an adjustment to constructed value for differences in circumstance of sale is necessary during the recalculation of the dumping margin as required in *Koyo Seiko Co.*, 16 CIT ____, Slip Op. 92–72, the ITA's adjustment of constructed value for differences in circumstance of sale, and the ITA's method of calculating that adjustment are sustained. ITA's decision not to deduct importer's profit from ESP is also sustained. Finally, the ITA's programming instructions using only nomenclature for matching sales of identical bear-

[8] The GATT Antidumping Code is a multilateral agreement endorsed by the United States in 1979 during the course of the General Agreement on Tariffs and Trade's Tokyo Round of Multilateral Trade Negotiations. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1979), 26 BISD 171 (GATT March 1980).

ings in the home and U.S. markets for Koyo is sustained. ITA may use the same method on remand to identify identical sales before resorting to the use, when necessary, of the three physical criteria methodology for selecting such or similar merchandise required in *Koyo Seiko Co.*, 16 CIT ____, Slip Op. 92–72. ITA shall report the results of the remand determination to this Court within ninety (90) days of the date the opinion is entered.

(Slip Op. 92–84)

UNITED STATES, PLAINTIFF *v.* THORSON CHEMICAL CORP., DEFENDANT

Court No. 88–11–00853

[Plaintiff United States brings this action against Defendant to recover $150,000.00 in assessed civil penalties for alleged fraudulent violations of 19 U.S.C. § 1592. The Court grants judgment for Plaintiff and assesses a civil penalty in the amount of $150,000, plus interest from the date of judgment. Defendant's counterclaim for restitution of tendered lost duties is dismissed.]

(Dated May 28, 1992.)

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane E. Meehan*), *Amy Schwartz*, Office of Regional Counsel, United States Customs Service, Of Counsel, for Plaintiff.

Irving A. Mandel and *Thomas J. Kovarcik*, *Jeffrey H. Pfeffer*, Of Counsel, for Defendant.

OPINION AND ORDER

CARMAN, *Judge:* The Plaintiff United States government seeks to recover a civil penalty assessed against Defendant Thorson Chemical Corporation ("Thorson") in the amount of $150,000.00, plus interest, for allegedly declaring false entered values for the imported merchandise by means of fraud in violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988).[1] Defendant denies it committed any violation of section 1592 and counterclaims for restitution from the government in the amount of $7,356.12, the sum tendered for lost duties from the alleged violations. The Court has jurisdiction over the action pursuant to 28 U.S.C. § 1582 (1988).

FACTS

Defendant Thorson (also referred to as "Thorson U.S.") is a corporation which was organized under the laws of New York State in February 1968 and was formed for the purpose of importing chemicals. Between October 22, 1980 and June 10, 1982, Thorson entered eleven shipments of chemical products from Europe into the commerce of the United States under the cover of the following consumption entries:

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[1] In the alternative, Plaintiff seeks civil penalties based upon gross negligence or negligence. *See* 19 U.S.C. § 1592 (1988). Because the Court finds fraud in this case, the merits of Plaintiff's alternative claims are not discussed.

Entry no.	*Approximate date of entry*
81–1001–167160	October 22, 1980
81–1001–167954	January 1, 1981
81–1001–168735	March 16, 1981
81–1001–790426	July 10, 1981
81–1001–790427	July 9, 1981
81–1001–791587	September 15, 1981
81–1001–791586	September 24, 1981
81–1001–816620	December 22, 1981
81–1001–881658	March 4, 1981
82–1001–881659	March 4, 1982
82–1001–882760	June 10, 1982

On or about September 23, 1982, the United States Customs Service ("Customs") commenced an audit of Thorson's importation records. Trial Transcript ("Tr.") at 35. The purpose of the audit was to investigate whether the chemicals imported by Thorson originated from Belgium and therefore were subject to the possible assessment of antidumping duties. Tr. at 34.

Among the workpapers prepared in connection with the audit was a memorandum dated July 15, 1983, from Regulatory Audit Division Director Joseph C. Sparano addressed to the Deputy Assistant Regional Commissioner of the New York Region. Def. Exh. L. In the memorandum Sparano indicated that the auditors had discovered that Thorson was using a double-invoicing system. The memorandum stated that the auditors found that Thorson presented Customs with lower valued invoices than the relating invoices found in Thorson's files. The memorandum further stated that the two invoices for the same merchandise differed by $20.00 per metric ton and that higher value was paid to the exporter, Thorson Chemical GmbH of Germany ("Thorson Germany").[2]

The results of the completed Thorson audit were documented in an audit report dated December 29, 1983. Based on the findings contained in that report, Customs began an investigation which resulted in the issuance of a pre-penalty notice to Thorson on April 25, 1985 and an amended pre-penalty notice on November 14, 1985. The amended pre-penalty notice stated that Thorson's double-invoicing system was due to fraud, resulted in undervaluing of dutiable values and a loss of duties in the amount of $7,356.12; the proposed penalty was $2,582,406.00 (the domestic value of the merchandise). Pl. Exh. 33 at 4.

Thorson responded to the pre-penalty notice on May 17, 1985. Pl. Exh. 33 at 1. In its response, Thorson denied any allegation of fraud or negligence, but admitted using a double-invoicing scheme on certain entries as a way of granting a loan to Thorson Germany, in order "to assist [its] German affiliate to overcome temporary financial difficulty so that [it] could continue to enjoy 90 day open account terms as opposed to

[2] Thorson Germany GmbH is a German entity which served as a purchasing agent in Europe for Thorson U.S. Eighty-five percent of the stock of Thorson Germany is owned by a pension plan, the beneficiaries of which are the employees of Thorson U.S.

sight letter of credit." *Id.* Thorson further stated that "overpayments" made to Thorson Germany were returned. *Id.*

Customs issued a penalty notice in the amount of $2,582,406.00 on May 19, 1986. Pl. Exh. 34 at 3. On June 12, 1986, Thorson filed a petition for relief from the penalty and tendered a check for $7,356.12 to the Customs Service. *Id.* In the petition Thorson again explained that the double-invoicing scheme was a method of granting a loan to its German affiliate without a promissory note because the note would have to be shown to the German banks and this would, in turn, threaten the affiliate's line of credit. *Id.* at 1. Thorson restated that the loans were repaid. Lastly, Thorson explained that in actuality there was no lower entered value for the two invoices because Thorson paid the German affiliate 1.5 percent above cost, as it had done for many years. *Id.*

On February 18, 1987, the Customs Service advised Thorson that the amount of the penalty would be remitted to $58,848.96 if payment were made within seven days. Pl. Exh. 35. Thorson tendered no additional monies to Customs and filed a supplemental petition for relief from the penalty.

Customs, calculating the five-year period for instituting the instant action from the date of entry of the subject merchandise, requested a waiver of the statute of limitations from Thorson.[3] In total, Thorson submitted four waivers of the statute of limitations, each waiving the statute for a one-year period. The instant action was filed on November 16, 1988.

Defendant Thorson then moved pursuant to Rule 56 of the Rules of this Court for summary judgment on the grounds that the instant action was barred by the statute of limitations. Because of certain factual contentions concerning the validity of certain waivers of the statute of limitations and other factual issues raised by the pleadings, the Court denied Defendant's motion. *United States v. Thorson Chem. Corp.*, 14 CIT ____, 742 F. Supp. 1170 (1990).

A four day trial of this action included several witnesses and approximately 800 pages of testimony. At the close of trial, the Court directed that the parties submit post-trial briefs for the purpose of clarifying certain matters raised at trial surrounding the eleven entries in this case.

Discussion

1. *The Waivers are Valid:*

The applicable limitations period for a penalty collection action is set forth at 19 U.S.C. § 1621. That section provides in pertinent part:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided*, That in the case

[3] The government must bring an action either (1) within five years of the date of the discovery of a fraudulent violation of 19 U.S.C. § 1592 or (2) within five years of the date of a grossly negligent or negligent violation of 19 U.S.C. § 1592. *See* 19 U.S.C. § 1621 (1988); *see also* Discussion.

> of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed.

19 U.S.C. § 1621 (1988).

The so-called "discovery rule" of section 1621 applies to fraudulent violations of section 1592. Customs' "knowledge of the falsity of import documents is a means to discovery of a section 592 violation and, therefore, causes the statute of limitations to begin to run." *United States v. R.I.T.A. Organics, Inc.*, 487 F. Supp. 75, 78 (N.D. Ill. 1980).

The statute of limitations is an affirmative defense. *See* USCIT Rule 8(d). The party asserting this defense must first establish a prima facie case that the claim is time barred. If a prima facie case is established, the burden then shifts to the plaintiff to show that some exception to the statute of limitations existed. *See* 51 Am. Jur. 2d *Licenses and Permits* §§ 483–485 (1970). In the instant case, therefore, the burden is on the government to prove that the time for bringing the action was tolled by the waivers in question.

The Customs Service has the authority to accept a waiver of the statute of limitations prescribed under 19 U.S.C. § 1621 "if it appears that further administrative consideration would promote final disposition of the matter." T.D. 76–33, 10 Cust. B. & Dec. 69 (1976). Customs' own rules provide that where the party requesting acceptance of the waiver is a corporation or other business entity, the waiver must "be signed by an officer authorized to act for the corporation or other business entity, and proof or such authorization must be included with the request." *Id.* at 70–71.

Within five years from the date of the earliest of the eleven subject entries, October 22, 1980, Customs requested that Thorson provide a waiver of the statute of limitations.[4] A waiver was executed by Thorson's president, Mr. Ernest Abrahamson, on September 11, 1985, within the applicable statute of limitations period for a fraudulent, negligent, or grossly negligent violation of 19 U.S.C. § 1592. Pl. Exh. 43. Accompanying the waiver was a letter from the corporation's secretary confirming that Mr. Abrahamson was the president of Thorson, he was duly authorized to endorse the waiver, and that his signature was authentic. *Id.* at 2. Customs accepted the waiver, which was for a one-year period. Pl. Exh. 44. This waiver therefore was clearly valid and tolled the statute of limitations period for one year, until October 1986.

Three subsequent waivers were submitted for one-year periods on May 21, 1986 (Pl. Exh. 45), February 19, 1987 (Pl. Exh. 48), and November 17, 1987 (Pl. Exh. 50). The May 21, 1986 waiver was accompanied by a corporate resolution authorizing the waiver. Pl. Exh. 47. The February 19, 1987 waiver was not accompanied by a corporate resolution, but

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[4] Mr. Norman Smolek, an employee of Customs who was assigned to the Fines, Penalties, and Forfeiture Office testified that it is the agency's policy to calculate the statute of limitations from the date of the violation (as opposed to the date of discovery of fraud) as a conservative measure. Tr. at 391.

was signed by an officer of the corporation. *See* Pl. Exh. 49. The November 17, 1987 waiver apparently included the corporate seal of Thorson and was accepted by Customs. Pl. Exh. 51. The Court finds that these subsequent waivers were validly executed and consecutively tolled the government's time for bringing the instant action, which was filed on November 16, 1988, within one year of the date of the last waiver. The Defendant's arguments to the contrary, as discussed below, are without merit.

The Defendant urges that the waivers are invalid on several grounds. First, at least one of the purported waivers did not contain a corporate resolution. Second, Customs did not properly inform Thorson of the differing limitation periods provided in 19 U.S.C. § 1621 for fraud and negligence. Third, the waivers were signed involuntarily because Customs provided Thorson with a sample waiver form (*see* Def. Exh. E.) and Thorson's president did not understand the meaning of the waiver statute. Fourth, the government failed to plead with particularity in the Complaint the date of discovery of the fraud. Lastly, even assuming Plaintiff did allege the date of discovery, the action is still time-barred because the date of discovery was, at very latest, when the government was first aware of the double-invoicing system, on July 15, 1983 (Def. Exh. L.), more than five years prior to the date the instant case was filed.

The statute of limitations issue was raised as an affirmative defense in Defendant's answer to the Plaintiff's Complaint. Although the Complaint did not plead facts relating to discovery of fraud, there is no evidence that Defendant was somehow harmed or otherwise prejudiced in this case on that account.[5]

While two of the waivers did not strictly conform to Customs' own guidelines, there is no evidence that those waivers were improper or otherwise illegally obtained. Although the February 19, 1987 waiver was unaccompanied by a corporate resolution, the Court observes that the waiver was signed by an officer of the corporation known to Customs, Mr. Dale L. Thornborough, who preceded Mr. Abrahamson as president of Thorson. Mr. Thornborough was the signatory on Thorson's response to Custom's pre-penalty notice of May 17, 1985. *See* Pl. Exh. 33. As to the last waiver dated November 17, 1987, while there was no accompanying corporate resolution, the waiver was executed by the president and sole shareholder of Thorson and apparently affixed with the corporate seal.[6]

[5] In *United States v. Gordon*, 7 CIT 350, 352 (1984), the Court found that the government in a § 1592 action involving allegations of fraud should, in its Complaint, plead facts relating to the date of discovery of the fraud. The *Gordon* Court nevertheless permitted the plaintiff to amend its Complaint to include such facts. In the instant action, the government asserted its own compliance with the statute of limitations for the first time in its motion to strike Defendant's affirmative defense, to which Defendant filed a response. Further, the Court permitted the parties to submit pre-trial as well as post-trial briefs addressed to, *inter alia*, the statute of limitations issue. In any event, the date of discovery of fraud in this case is not relevant because the Court finds that proper waivers were executed within five years of the *entry* of the merchandise. *See* Discussion.

[6] Thorson is a New York corporation, and the Court observes that pursuant to New York law, "[t]he presence of the corporate seal on a written instrument purporting to be executed by authority of a domestic or foreign corporation shall be prima facie evidence that the instrument was so executed." N.Y. Bus. Corp. Law § 107 (McKinney 1986).

According to the Defendant, Mr. Abrahamson, the president of Thorson who executed the November 17, 1987 waiver, owned 50 percent of the outstanding shares of the corporation from 1968 to 1985 and 100 percent from 1985 to 1988. Mr. Thornborough owned 50 percent of the outstanding shares from 1968 to 1985.

In the instant case, all the waivers were accepted by Customs, and there is no question in this case that the persons who signed the waivers were acting without authority to do so, or that Defendant was prejudiced by Custom's action.[7] The Court therefore finds that the waivers were validly executed and the action was timely filed. *See* 19 U.S.C. § 1621.

Defendant's arguments concerning the discovery date of fraud are inapposite. Even if the Court were to accept the Defendant's early date of discovery of the fraudulent violations, it is clear that this "discovery" occurred later than the first date of entry of the merchandise, which is the date from which the government conservatively calculated the time for bringing the instant action (*i.e.*, within five years from when an alleged violation was committed). Consequently, the action was necessarily timely filed for the purposes of a fraudulent violation.

Defendant's claims that the waivers were involuntary because Plaintiff allegedly concealed certain information from them concerning the date of discovery of the merchandise and otherwise misled and coerced Defendant into signing the waivers are without merit. There is insufficient evidence before the Court that Customs acted improperly in obtaining the waivers. Thorson's sole witness, the president of Thorson, testified that he could not remember any representations made by Customs regarding differing statute of limitation periods for fraud and negligence claims. Tr. at 626. In fact, Thorson's witness could remember few, if any, details about the circumstances surrounding the waivers. Finally, that Customs supplied Thorson with a standardized waiver form is hardly evidence of coercion; the form was intended for Thorson's own benefit, not to induce it to waive its rights.

2. *Fraudulent Violations of 19 U.S.C. § 1592:*

Section 1592(a)(1) of Title 19, United States Code states that:

> (1) *General Rule.* – Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence or negligence –
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of –
>
> (i) any document, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).
>
> (2) *Exception.* – Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.

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[7] The Court notes that up until the time of this case, Thorson never complained to Customs that the waivers were somehow improperly obtained or executed by persons other than those with authority to do so of behalf of the corporation. Indeed, in dismissing Defendant's motion for summary judgment, the Court posited that Defendant "may wish to assert that [its] president, who was sole shareholder of the corporation, dishonestly signed the waiver and contend that such signing might be *ultra vires*." *Thorson Chem.*, 14 CIT at ___, 742 F. Supp. at 1172. However, Defendant has explicitly disavowed such a defense in this case.

Thus, section 1592 covers three degrees of culpability, fraud, gross negligence, and negligence. While the statute itself does not define these, the Court is guided by case law and Customs' own regulations. Because the Court finds that Defendant has committed fraudulent violations of 19 U.S.C. § 1592, it does not address the merits of Plaintiff's alternative gross negligence and negligence claims.

To prove a fraudulent violation of the statute, the Plaintiff must satisfy the following elements. It must establish, by clear and convincing evidence, that the Defendant (1) deliberately introduced merchandise into the commerce of the United States by means of material false statements, acts, or omissions (2) with intent to defraud the revenue or otherwise violate the laws of the United States. 19 U.S.C. §§ 1592(a)(1) and (e)(2); *United States v. Daewoo Int'l (America) Corp.*, 12 CIT 889, 896, 696 F. Supp. 1534, 1541 (1988).[8]

The government contends that it has satisfied the first element of fraud by placing in evidence material false statements which appear on each of the consumption entries in this case; all of the consumption entries were signed by Thorson. *See* Customs Form 7501 in Pl. Exhs. 1–11. According to the government, Thorson falsely declared, in a printed statement located on the reverse side of each of the consumption entries, as follows:

> To the best of my knowledge and belief, all statements appearing in this entry and in the invoice or invoices and other documents presented herewith and in accordance with which the entry is made, are true and correct in every respect; *the entry and invoices set forth the true prices, values, quantities, and all information as required by the laws and the regulations made in pursuance thereof*; the invoices and other documents are in the same state as when received; *I have not received and do not know of any other invoice, paper, letter, document, or information showing a different currency price, value, quantity or description of the said merchandise*, and if at any time hereafter I discover any information showing a different state of facts I will immediately make the same known to the District Director of Customs at the port of entry.

Pl. Exhs. 1–11 (emphasis added); *see also* 19 U.S.C. §§ 1482(b), 1484, 1485 (1988).

The declarations contained in the entry papers summarize Thorson's legal obligation pursuant to the statute to file appropriate documentation permitting Customs to properly assess duties and determine whether any other applicable requirement of law is met. *See* 19 U.S.C. § 1484. The statute specifically requires that invoices contain a declaration that there are no other invoices differing from the invoice submitted to Customs and that both the information contained in the declaration and invoice are true and correct. 19 U.S.C. §§ 1482(b) and 1485.

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[8] Customs defines a fraudulent violation of section 1592 as one "result[ing] from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the United States, as established by clear and convincing evidence." 19 C.F.R. Pt. 171, App. B(B)(3) (1988).

Thorson admits that it utilized a double, and in some instances, triple-invoicing scheme. Thorson also admits that those invoices differed from the commercial invoices presented to Customs; in some cases the purchase price recorded for the imported merchandise varied by as much as $20.00 per metric ton. Thus, Thorson clearly made a false statement on the entry papers when it declared that no other invoices existed for the merchandise in issue other than those invoices submitted to Customs. *See United States v. Brown*, 404 F. Supp. 968, 970 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 315 (2d Cir. 1976).

These false statements were material because they induced Customs to believe that the declarations appearing on the commercial invoices were correct. The false statements clearly had a tendency to influence Custom's decision in assessing duties. *See Daewoo*, 12 CIT at 894, 696 F. Supp. at 1540; *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986).[9]

Thorson also falsely declared on each consumption entry that it was the consignee and the actual owner of the merchandise. Moreover, Thorson admitted at trial for the first time that it falsely identified the buyer and the seller of the merchandise.

Defendant's witness Mr. Abrahamson testified that Thorson Germany was not the buyer of the merchandise as declared on the special customs invoices submitted to Customs and never sold the merchandise to Thorson U.S. *See* Customs Form 5515 contained in Pl. Exhs. 1–11. Thorson admitted through its witness that it knew at the time it entered the merchandise that the buyer of the merchandise from the Belgian manufacturer Solvay was not Thorson Germany, and that Thorson U.S. was not merely the consignee of the merchandise. By claiming at trial that the buyer was Thorson U.S. and not Thorson Germany, Defendant conceded the falsity of its previous statements.[10]

These false statements are material because the identity of the entity that sold the merchandise to the U.S. importer is an important relationship which forms the basis of the transaction value of the merchandise. *See* 19 U.S.C. § 1401a(b)(4)(A) (1988). Correct identification of the buyer and seller is necessary for Customs to correctly appraise the merchandise and determine the proper duties.[11]

Consequently, the Court finds that there is clear and convincing evidence that Defendant intentionally made material false statements con-

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[9] The Customs regulations define a material statement as one which "has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty." 19 C.F.R. Pt. 171, App. B(A) (1988).

[10] Mr. Abrahamson testified at trial that Solvay had an interest in not being identified as a seller in the United States because they produced many of the same products as Allied Chemical, a domestic company. (Tr. at 595). Another likely concern was the existence of an affirmative antidumping finding by the Department of Commerce covering perchloroethylene imported from certain European countries, including Spain and Belgium. *See* Tr. at 637, 734. Commerce's affirmative finding of dumping is published at 44 Fed. Reg. 29,045 (May 1979).

[11] Further, without proper identification of the seller Customs cannot determine the correct country of origin. Customs would then not be able to determine, for example, whether the merchandise was imported in violation of any existing restrictions upon merchandise originating from specific countries. Indeed, the original audit in this case was initiated to investigate whether the chemicals imported by Thorson U.S. originated from Belgium and, therefore, were subject to the possible assessment of antidumping duties. Tr. at 34.

cerning the existence of undisclosed double and triple invoices and the correct identity of the buyer and seller.

The Plaintiff also asserts that it has proved, by clear and convincing evidence, that prices declared by Thorson for the entered merchandise were false and that Thorson undervalued the merchandise. The government bases its argument on the lack of evidence that the invoices submitted to Customs in fact recorded the true prices paid for the merchandise.

The Court finds that there is clear and convincing evidence that Thorson declared false purchase prices and falsely undervalued the entered merchandise, by virtue of Thorson's decision not to reveal what it paid Thorson Germany for that merchandise. The payments sent to Thorson Germany from Thorson U.S. which appear on the undisclosed invoices are the only evidence from Thorson's own books of the correct purchase prices. Aside from the less than credible testimony of Defendant's own witness, there is no other evidence that these prices were not the actual prices paid for the merchandise. It is significant that Thorson can produce no documentation of what it considers the true price of the merchandise which it says was submitted to Customs.

For the above reasons, the Court finds there is clear and convincing evidence that Thorson made false statements concerning the purchase price of the merchandise and recorded a false entered value. Because Defendant falsely understated the entered value, Customs appraised the imported merchandise based upon the lower declared values and assessed duties upon subject entries in a lower amount than was actually owed. These statements are clearly material for the purposes of section 1592 because they alter the appraisement and liability for duty. *See Rockwell*, 10 CIT at 42, 628 F. Supp. at 209–10.

Nevertheless, Defendant argues that the differences in purchase price for the merchandise can be explained by an alleged loan scheme discussed earlier in this opinion. The government counters that there is insufficient evidence that any loan arrangement between Thorson U.S. and Thorson Germany ever existed that would allegedly account for the purchase price discrepancies found in the invoices. Based upon a careful examination of Defendant's argument set forth below, the Court finds that the Defendant's loan theory is not credible and runs counter to the weight of evidence in this case.

Defendant's principal evidence in support of its loan theory is the testimony of its witness, Mr. Abrahamson. Mr. Abrahamson admitted on cross-examination that the double and triple-invoices observed by Customs auditor Costen covered the same merchandise as the invoices that was entered by means of the entries in this case. Tr. at 687, 688. Defendant maintains, however, that the higher purchase prices were not the actual prices paid for the merchandise; the recorded prices in the unsubmitted invoices were inflated to include loan disbursements made to Thorson Germany. Therefore, Defendant argues that there were no false statements made to Customs regarding the purchase price and no

intent to defraud Customs of any revenue or violate the Customs laws. Further, Defendant insists that the actual purchase price for the merchandise was accurately represented to Customs and therefore there were no lost duties involved in this case.

The Court makes the follow observations with regard to Defendant's theory. First, there was no documentary evidence of a loan. Although Mr. Abrahamson testified that he recorded the overpayments by which Thorson allegedly extended the loan to Thorson Germany and maintained a file containing the double and triple invoices, Thorson produced no such file or invoices. Tr. at 699–700, 719.[12] It is remarkable that each and every potential piece of evidence that could allegedly have accounted for the differences between the purchase prices either was lost, misplaced, or stolen.[13]

Moreover, Mr. Abrahamson did not remember even the most basic details of an alleged loan arrangement. He stated that the amount of the loans were somewhere between $100,000 to $200,000 (Tr. at 602, 640), but was unaware when the loan scheme started, how or when the loan was repaid and at what interest rate, or the amounts of the repayments (Tr. at 606, 641, 645, 718). Mr. Abrahamson could not even recall who negotiated the loan with Thorson Germany. Tr. at 718.

The sole piece of evidence which Defendant relies upon to support its loan theory is a "debit memo" which allegedly showed that Thorson Germany repaid the loans made by Thorson U.S.[14] Mr. Abrahamson testified on direct examination that Thorson would issue such debit memos to Thorson Germany for alleged overpayments made by Thorson upon the merchandise. Tr. at 772. The document in question is dated December 28, 1982, and appears to cover overpayments of $20.00 per metric ton on three shipments of chemicals. As counsel for the government correctly pointed out at trial, however, there is no evidence that the document was part of Thorson's records. Tr. at 615. For example, at his deposition, Mr. Abrahamson could not recognize the very same debit memo allegedly issued by Thorson. Tr. at 779. Moreover, there is no evidence as to who prepared or signed it, when it was prepared, or whether it was prepared contemporaneously with the alleged debt obligation. This unauthenticated document is not enough to raise a sufficient level of doubt in the Court's mind to rebut the otherwise clear and convincing evidence of fraud in this case.

The government has also satisfied the second element of fraud by proving by clear and convincing evidence that material false statements were made with the intention to defraud the revenue or otherwise vio-

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[12] Thorson's suggestion that it would not be in its interest to maintain documentation of an alleged loan scheme on its own books makes little sense. Thorson's witness Abrahamson testified that Thorson U.S. was a separate company from Thorson Germany and a loan recorded on Thorson U.S.'s books would not show up on the books of the German affiliate. Tr. at 721. Moreover, there appears to be no reason why Thorson U.S. would have to conceal the alleged "loan" made to Thorson Germany from German auditors who, according to Defendant's own witness, were not likely to come to the United States to examine the books of Thorson U.S. Tr. at 722.

[13] According to Defendant, in 1988 Thorson's corporate files were stolen from its office in New York. *See* Pl. Exh. 40.

[14] Defendant attempted to introduce the debt memo into evidence at trial as a separate exhibit. The application, it appears, was redundant because the debit memo was already in evidence as part of Plaintiff's Exhibit 33.

late the Customs laws of the United States. This element of intent is satisfied by Thorson's own admissions that it knowingly used a double and triple-invoicing system to pay Thorson Germany more money for the entered merchandise than the prices which were declared to Customs. Thorson's declarations upon the entry documents that no other invoices existed besides those submitted to Customs were therefore executed by Thorson with full knowledge of their falsity. Consequently, Thorson's own admissions in this regard establish its intent to violate the Customs laws. *See Daewoo*, 12 CIT at 896, 696 F. Supp. at 1541.

This Court also finds Defendant's assertion that there was a loan scheme simply incredible. As discussed earlier, Defendant's witness could not recall the most basic terms of the alleged loan arrangement, such as the overall amount of the loan, the time the loan began and ended, the rate of interest, and so on.

Furthermore, Thorson admits that it falsely identified the buyer and seller of the merchandise in order to protect the identity of who it now asserts was the true seller, Solvay. Consequently, the false statements regarding the identity of the buyer and seller were made with intent to violate the Custom's laws. With respect to the false undervaluations, Thorson's admission that it knowingly failed to submit to Customs the price paid to Thorson Germany in exchange for the imported merchandise also establishes Thorson's intent to violate the Customs laws.

3. *Lost Duties and Penalties:*

According to Plaintiff's Complaint, Defendant's fraudulent violations of section 1592 resulted in total lost duties in the amount of $6,929.82. Thorson has paid the lost revenue. Pl. Exh. 34.[15] Because the Court has sustained Plaintiff's fraud claim, the Court dismisses Defendant's counterclaim for restitution of the monies tendered to Customs for the lost duties.

Section 1592 provides for *de novo* review of penalty claims in this Court. 19 U.S.C. § 1592(e)(1). The maximum penalty for a fraudulent violation of section 1592 is the equivalent of the domestic value of the merchandise. 19 U.S.C. § 1592(c)(1). Customs has calculated the domestic value of the merchandise at $2,402,695.00.[16] However, the government in this case asks the Court to assess a far less severe civil penalty of $150,000.00.

The Court has found that Defendant committed fraud. Defendant intentionally violated the laws of the United States by not disclosing double and triple-invoices that differed from that which it submitted to Customs. Worse, Thorson falsely declared otherwise. The degree of culpability is a relevant factor for the Court in assessing a penalty under section 1592. *See United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 764 (1st Cir. 1985). Thorson was an experienced importer which should be held

[15] Thorson actually remitted $7,356.12, which was the amount of lost duties represented to Thorson in the Notice of Penalty. *See* Pl. Exh. 34 at 3.

[16] Apparently after further calculations following trial, Plaintiff has modified its original domestic value total represented in the Complaint. The Complaint listed $2,420,198.00 as the domestic value of the eleven entries in this case.

thoroughly accountable for the seriousness of the fraud it perpetrated. Further, Thorson's explanation for the discrepancies in the documentation appear false and contrived.

The submission of true and complete statements to Customs is essential for the agency to carry out is function of appraising merchandise, protecting revenue, and enforcing the laws which restrict and deny entry of certain merchandise. Violation of these laws, therefore, is extremely serious and should be dealt with accordingly. This is particularly true where fraudulent behavior is concerned, for the public trust is intentionally violated. Good faith compliance with the Customs laws and regulations must be adhered to by importers, and the breach of such laws should be sufficiently penalized to deter others from considering such actions.

For the reasons stated above, the Court grants judgment for Plaintiff and assesses a civil penalty in the amount of $150,000.00, plus interest from the date of judgment. Defendant's counterclaim for restitution of tendered lost duties is dismissed.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	
C92/105 5/22/92 Tsoucalas, J.	Liz Claiborne Accessories, Inc.	89–10–00561	4
C92/106 5/22/92 Tsoucalas, J.	Liz Claiborne Accessories, Inc.	90–1–00010	4
C92/107 5/22/92 Tsoucalas, J.	Liz Claiborne Accessories, Inc.	90–1–00050	4
C92/108 5/22/92 Tsoucalas, J.	Liz Claiborne Accessories, Inc.	90–3–00158	4
C92/109 5/22/92 Tsoucalas, J.	Liz Claiborne Accessories, Inc.	90–6–00274	4
C92/110 5/22/92 Carman J.	Westcliffe Publishers Inc.	89–5–00223	2
C92/111 5/29/92 Tsoucalas, J.	Alh Systems Inc.	85–12–01775	V

CLASSIFICATION DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
4202.32.20 20%	4202.32.10 12.1¢/kg + 4.6%	Agreed statement of facts	New York Various styles of flat goods
4202.32.20 20%	4202.32.10 12.1¢/kg + 4.6%	Agreed statement of facts	New York Various styles of flat goods
4202.32.20 20%	4202.32.10 12.1¢/kg + 4.6%	Agreed statement of facts	New York Various styles of flat goods
4202.32.20 20%	4202.32.10 12.1¢/kg + 4.6%	Agreed statement of facts	New York Various styles of flat goods
4202.32.20 20%	4202.32.10 12.1¢/kg + 4.6%	Agreed statement of facts	New York Various styles of flat goods
274.60 6¢ per lb.	270.25 Free of duty	Agreed statement of facts	Denver Books with textual and pictorial content
Various provisions of Schedule 4	494.60 Various rates for entries marked "A" 407.16, 407.17 or 407.19 Various rates for entries marked "B" 432.25, 432.26, or 432.28 Various rates for entries marked "C"	Agreed statement of facts	Chicago Three types of polyurethane resins

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.
C92/112 5/29/92 Tsoucalas, J.	General Electric Co,	89–5–01261–S

SSIFICATION DECISIONS – Continued

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
685.90 5.3%	709.63 2.1% for Operator Console 710.80 4.9% for Diagnostic Console	Agreed statement of facts	Milwaukee Components and optional units of X-ray computerized tomography

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	BASIS O VALUATI
V92/5 5/29/92 Goldberg, J.	Int'l Seaway Trading Corp.	81–10–01373	American se price
V92/6 5/29/92 Goldberg, J.	Int'l Seaway Trading Corp.	81–10–01374	American se price
V92/7 5/29/92 Goldberg, J.	Int'l Seaway Trading Corp.	82–4–00464	American se price

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OF TION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
selling	Liquidated appraised values less 12% per pair	Agreed statement of facts	New York Footwear
selling	Liquidated appraised values less 12% per pair	Agreed statement of facts	Los Angeles Footwear
selling	Liquidated appraised values less 12% per pair	Agreed statement of facts	Los Angeles Footwear

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